

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: )  
)  
CKF Produce Corp., ) PACA-D Docket No. 19-0017  
)  
Respondent. )

REC'D - USDA/DALJ/DHC  
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**DECISION AND ORDER**

Appearances:

*Christopher Young, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, the Associate Deputy Administrator of the Fair Trade Practices Program, PACA Division, Agricultural Marketing Service (“AMS”); and*

*Roger Mark Newyear, Esq., Bronx, New York, for the Respondent, CKF Produce Corp.*

Before Channing D. Strother, Chief Administrative Law Judge.

**Preliminary Statement**

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a *et seq.*) (“PACA”); the regulations promulgated thereunder by the Secretary of Agriculture (7 C.F.R. §§ 46.1 through 46.45) (“Regulations”); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) (“Rules of Practice”).

The Associate Deputy Administrator, Fair Trade Practices Program, PACA Division, Agricultural Marketing Service, United States Department of Agriculture (“Complainant”), initiated this proceeding on February 13, 2019 by filing a complaint and notice to show cause (“Complaint”)<sup>1</sup> why CKF Produce Corp. (“Respondent”) should not be denied a license pursuant

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<sup>1</sup> See 7 C.F.R. § 1.132 (“*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.”).

PACA section 4(d) (7 U.S.C. § 499d(d)). The Complaint alleges that, during the period March 2017 through November 2018, Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) by failing to make full payment promptly in the amount of \$916,442.81 to twenty-two sellers for 102 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in the course of interstate and foreign commerce.<sup>2</sup> The Complaint requests, *inter alia*, “a finding be made that 1) Respondent has willfully, flagrantly, and repeatedly violated the PACA; and 2) Respondent is unfit to be licensed under the PACA.”<sup>3</sup> On March 8, 2019, Respondent filed an answer admitting the jurisdictional allegations of the Complaint, denying the remaining allegations, setting forth affirmative defenses, and requesting an oral hearing.

Respondent was previously licensed under the PACA; however, Respondent’s license terminated on August 2, 2018, pursuant to PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee.<sup>4</sup> On September 5, 2018, following the filing of a PACA reparation complaint against Respondent, Complainant began investigating Respondent for failing to pay promptly for produce in violation of PACA section 2(4).<sup>5</sup> On November 12, 2018, Complainant conducted an on-site investigation at Respondent’s place of business and documented that Respondent failed to pay produce sellers promptly for produce in

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<sup>2</sup> Complaint at 3.

<sup>3</sup> *Id.* at 4. Complainant also requests “that the Administrative Law Judge order that the facts and circumstances of Respondent’s violations be published.” *Id.*

<sup>4</sup> Respondent’s PACA license, number 2016-1004, was issued on August 2, 2016. *See* Respondent’s Brief at 1; Complainant’s Brief at 1.

<sup>5</sup> Complainant’s Brief at 1; Tr. I at 23; Tr. II at 17-18; CX2; *see* CX19; CX20; CX21.

accordance with PACA.<sup>6</sup> On January 16, 2019 – approximately six months after Respondent’s license was terminated and two months after Complainant’s on-site investigation – Respondent submitted a completed license application to Complainant.<sup>7</sup> Thus, at the time Respondent’s application was submitted, Complainant had already begun an investigation of Respondent that revealed Respondent was failing to pay promptly in accordance with PACA. Complainant subsequently filed the aforementioned Complaint, which contends that Respondent’s license application should be refused.

For the reasons discussed herein, I find that Complainant properly determined Respondent is unfit to engage in the business of a commission merchant, dealer, or broker and that Complainant properly withheld issuance of a PACA license to Respondent pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)).

#### **Jurisdiction and Burden of Proof**

As noted above, AMS filed its Complaint pursuant to the Rules of Practice, which apply to PACA and the Regulations. On March 8, 2019, Respondent filed a timely answer that requested an oral hearing. The case was reassigned to the undersigned on March 28, 2019 and is properly before me for resolution.

In addition to being a disciplinary proceeding, this is a Notice to Show Cause proceeding to determine why Respondent’s pending license application should not be denied. In such a proceeding, the burden of proof initially falls on the complainant, who must demonstrate why the

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<sup>6</sup> Complainant’s Brief at 1-2; Tr. I at 23, 35, 41, 56, 100, 104, 106; CX2; CX4; CX5; CX13; *see* CX19; CX21.

<sup>7</sup> Complainant’s Brief at 2; Complaint at 2-3.

license application is being challenged (*i.e.*, why the respondent is not fit to receive a license).<sup>8</sup> Once the complainant has provided such good reason, the burden of proof shifts to the applicant (or respondent) to show cause why its application should be granted (*i.e.*, why it is fit to receive a license).<sup>9</sup>

The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,<sup>10</sup> such as this one, is the preponderance of the evidence.<sup>11</sup> A preponderance of the evidence here supports findings that, in most but not all instances, Respondent violated the Act and Regulations as alleged in the Complaint, and Respondent's license application should therefore be denied.<sup>12</sup>

#### **Procedural History**

Complainant initiated this proceeding on February 13, 2019 by filing a complaint and

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<sup>8</sup> See *Brand*, 53 Agric. Dec. 1628, 1635-36 (U.S.D.A. 1994); *Williamsport Purveyors, Inc.*, 48 Agric. Dec. 1092, 1099 (U.S.D.A. 1989), *aff'd sub nom. Williamsport Purveyors, Inc. v. U.S. Dep't of Agric.*, 916 F.2d 82 (3d Cir. 1990); *H & J Brokerage, Inc.*, 45 Agric. Dec. 1154, 1196 (U.S.D.A. 1986) (“[O]nce complainant established that Mr. Scharf engaged in a practice of character prohibited by the Act, the burden of proof was on respondent to show that it is, nonetheless, fit to receive a license.”); *Produce, Inc.*, 36 Agric. Dec. 684, 692 (U.S.D.A. 1977).

<sup>9</sup> See *H & J Brokerage, Inc.*, 45 Agric. Dec. at 1196; *Pappas Produce, Inc.*, 36 Agric. Dec. 684, 692 (U.S.D.A. 1977).

<sup>10</sup> 5 U.S.C. §§ 551 *et seq.*

<sup>11</sup> See *Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding that the standard of proof in administrative proceedings is a preponderance of the evidence); *Havana Potatoes of N.Y. Corp.*, 56 Agric. Dec. 1017, 1021 (U.S.D.A. 1997) (Order Den. Pet. for Recons.) (“The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard, and it has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence.”).

<sup>12</sup> See *Havana Potatoes of N.Y. Corp.*, 56 Agric. Dec. at 1020-21 (“Complainant, as proponent of an order in this proceeding, has the burden of proof. Complainant, therefore, bears the initial burden of coming forward with evidence sufficient for a prima facie case. The burden of proof does not, however, require Complainant to disprove each of Respondent's assertions or theories of the case.”).

notice to show cause (“Complaint”)<sup>13</sup> why Respondent should not be denied a license pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)). On March 8, 2019, Respondent filed an answer admitting the jurisdictional allegations of the Complaint, denying the remaining allegations, setting forth affirmative defenses, and requesting an oral hearing.

Following a telephone conference with counsel for the parties on March 14, 2019, I issued an Order Setting Deadlines for Submissions and Order Scheduling Hearing for April 9-11, 2019. On March 20, 2019, I assigned the case to Administrative Law Judge Jill S. Clifton (“Judge Clifton”); however, the case was subsequently reassigned to the undersigned.<sup>14</sup>

On March 26, 2019, Complainant filed its proposed Witness and Exhibit List. Respondent filed its proposed Witness and Exhibit List on April 2, 2019.

An in-person hearing was held on the record, before the undersigned, on April 9 and 10, 2019 in New York, New York. Christopher Young, Esq., of the Office of the General Counsel, United States Department of Agriculture, represented Complainant, and Roger M. Newyear, Esq., represented Respondent. Pursuant to Respondent’s request, a Spanish language interpreter was made available for and used by Respondent’s witnesses.<sup>15</sup> Complainant introduced the testimony of Marketing Specialist Steve Seo<sup>16</sup> and Senior Marketing Specialist Sharlene Evans.<sup>17</sup>

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<sup>13</sup> See 7 C.F.R. § 1.132 (“*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.”).

<sup>14</sup> See Docket Control Sheet filed March 28, 2019.

<sup>15</sup> See Respondent’s Request, filed April 5, 2019, at 1 (“The reason for this request is that all of the Respondent’s proposed witnesses are Spanish speaking individuals.”); Tr. I at 4.

<sup>16</sup> Tr. I at 21-76 (direct), 77-174 (cross), 175-90 (redirect), 191-96 (recross); Tr. II at 7-8.

<sup>17</sup> Tr. II at 146-70 (direct), 171-77 (cross), 178-203 (recross), 204-218 (recross), 219-21 (redirect).

Respondent introduced the testimony of Koji Ueno,<sup>18</sup> Respondent's owner, and Victor Fontana,<sup>19</sup> Respondent's accountant. Admitted to the record were Complainant's exhibits, identified as CX 1 through 43,<sup>20</sup> and Respondent's exhibits, identified as RX 1 through 6. A transcript of the hearing was prepared (hereinafter cited as "Tr. (volume number) at (page number)").

On May 21, 2019, Complainant filed proposed corrections to the transcript. On the same date, Respondent filed a notice that it did "not have any corrections to the transcript to be made" and did "not have any objections to the corrections propounded by the Complainant."<sup>21</sup> On May 29, 2019, I entered an order approving Complainant's proposed corrections to the transcript, stating that "the hearing transcript is considered amended to incorporate them."<sup>22</sup>

On July 12, 2019, I issued an Order Approving Party Stipulations as to Exhibits and Filing Dates. Pursuant to that order, Complainant filed its additional exhibits, CX 23 through 43, on July 17, 2019, which were admitted to the record.

Complainant filed its "Proposed Findings of Fact, Conclusions, and Order" ("Complainant's Brief") on August 5, 2019. Appended to Complainant's Brief was an additional exhibit, CX44. Respondent stipulated to the introduction of CX44 into evidence, and it is hereby admitted to the record. On the same date, Respondent filed "Brief for Respondent" ("Respondent's Brief"). On September 6, 2019, Complainant and Respondent filed their respective Reply Briefs.

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<sup>18</sup> Tr. II at 10-84 (direct), 85-119 (cross), 120-136 (redirect), 137-142 (recross), 143-45 (redirect).

<sup>19</sup> Tr. I at 200-218 (direct), 219-36 (cross), 237-41 (redirect), 242-44 (recross).

<sup>20</sup> See also Order Approving Party Stipulations as to Exhibits and Filing Dates at 1-2.

<sup>21</sup> Respondent's Transcript Corrections at 1.

<sup>22</sup> Order Approving Proposed Transcript Corrections at 1.

The record in Docket No. 19-0017 is closed.

### **Statutory Background**

Congress enacted PACA in 1930 to regulate the sale of produce and promote fair dealing in the sale of perishable agricultural commodities.<sup>23</sup> PACA is an intentionally “tough law”<sup>24</sup> that was created “for the purpose of providing a measure of control and regulation over a branch of industry which is engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsibly business conduct, and unfair methods are numerous.”<sup>25</sup>

Under PACA, those who buy or sell specified quantities of perishable agricultural commodities at wholesale in interstate or foreign commerce are required to have a license issued by the Secretary of Agriculture.<sup>26</sup> PACA “makes it unlawful for a licensee to engage in certain types of unfair conduct”<sup>27</sup> and requires regulated merchants, dealers, and brokers to “truly and correctly . . . account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had.”<sup>28</sup> For purposes of PACA, “full payment promptly” means payment made within ten days after the date the produce is accepted, unless the parties have agreed otherwise, in writing, prior to the sale.<sup>29</sup> It is well established that, where there is more than one failure to make prompt payment for the purchase of produce and

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<sup>23</sup> *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir. 2003) (citing *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1066 (2d Cir. 1995)).

<sup>24</sup> *Hawkins v. U.S. Dep’t of Agric.*, 10 F.3d 1125, 1130 (5th Cir. 1993).

<sup>25</sup> H.R. REP. NO. 84-1196, at 2 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701.

<sup>26</sup> 7 U.S.C. §§ 499a(b)(5)–(7), 499c(a), and 499d(a).

<sup>27</sup> *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 686 (D.C. Cir. 2007).

<sup>28</sup> *See* 7 U.S.C. § 499h(a).

<sup>29</sup> 7 C.F.R. § 46.2(aa)(5), (11).

the amount owed is more than *de minimis*, there is a violation of PACA and the violation is considered repeated and flagrant regardless of the reason for non-payment.<sup>30</sup>

Further, if the Secretary determines after an administrative proceeding that a commission merchant, dealer, or broker has violated any provision of PACA section 2(4), the Secretary may publish the facts and circumstances of the violation or suspend the violator's license for up to ninety days.<sup>31</sup> Where the Secretary determines that the violations were repeated or flagrant, the Secretary may order the violator's PACA license revoked.<sup>32</sup> Where a respondent has committed flagrant and repeated violations of PACA section 2(4) by failing to pay promptly for produce by the time of the hearing, or 120 days following service of the Complaint (whichever comes first), revocation of the respondent's PACA license is the appropriate sanction.<sup>33</sup> Failure to pay for produce is a severe violation under PACA for which revocation is the appropriate sanction; where a license application is pending and failures to pay have been established, denial of a PACA license is warranted.<sup>34</sup>

Moreover, the Secretary may deny the license application of a corporation if he finds that the applicant, prior to the date of filing the application, has "engaged in any practice of the character prohibited by the Act."<sup>35</sup> Failure to make full payment promptly for produce in

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<sup>30</sup> *The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (U.S.D.A. 1998); see *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1211 (U.S.D.A. 1996).

<sup>31</sup> See 7 U.S.C. § 499h(a).

<sup>32</sup> See *H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 757, 762-63 (U.S.D.A. 2001).

<sup>33</sup> *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

<sup>34</sup> See *Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1209 (U.S.D.A. 1996), *pet. for review denied*, 151 F.3d 735 (7th Cir. 1998); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 992-93 (2d Cir. 1974).

<sup>35</sup> 7 U.S.C. § 499d(d); see *Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 746 (U.S.D.A. 1992); *Williamsport Purveyors, Inc.*, 48 Agric. Dec. 1092, 1099 (U.S.D.A. 1989) ("The issuance of a PACA license is the Department's attestation to the industry that the licensee will conduct

interstate and foreign commerce is unlawful under PACA and is therefore a practice of the character prohibited by the Act.<sup>36</sup> In transactions in interstate or foreign commerce, “failure to pay for produce is a very serious violation of the Perishable Agricultural Commodities Act.”<sup>37</sup> The prompt-payment provisions of PACA are meant to ensure that produce shipped cross-country or great distances – transactions that are subject to “opportunities for sharp practices and irresponsible business conduct” – are paid for expeditiously.<sup>38</sup> PACA’s requirement of expeditious payment is necessary to prevent a domino effect where the failure to pay one seller leads to that seller’s inability to pay its suppliers, with the potential to cause great harm to the produce industry as a whole.<sup>39</sup>

#### Authorities

This proceeding involves alleged violations of PACA section 2(4) (7 U.S.C. § 499b(4)). Section 2(4) requires merchants and dealers to make “full payment promptly” for perishable agricultural commodities, usually within ten days of acceptance, unless the parties agreed to different terms prior to the purchase.<sup>40</sup> Specifically, section 2(4) makes it unlawful “[f]or any commission merchant, dealer, or broker to . . . fail or refuse truly and correctly to account and

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its business in compliance with the Act and applicable regulations.”), *aff’d sub nom. aff’d sub nom. Williamsport Purveyors, Inc. v. U.S. Dep’t of Agric.*, 916 F.2d 82 (3d Cir. 1990); *Pappas Produce, Inc.*, 36 Agric. Dec. 684 (U.S.D.A. 1977).

<sup>36</sup> See *Davila*, 36 Agric. Dec. 696, 703 (U.S.D.A. 1997).

<sup>37</sup> *Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118, 123 (U.S.D.A. 1984).

<sup>38</sup> S. REP. NO. 84-2506 at 3 (1956), reprinted in 1956 U.S.C.C.A.N. 3699, 3701; see *Harry Klein Produce Corp. v. U.S. Dep’t of Agric.*, 831 F.2d 403, 405 (2d Cir. 1987).

<sup>39</sup> See, e.g., *In re Magic Restaurants, Inc.*, 205 F.3d 108, 111 (3d Cir. 2000); *The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1628-29 (U.S.D.A. 1993).

<sup>40</sup> 7 C.F.R. § 46.2(aa)(5); see 7 C.F.R. § 46.2(aa)(11) (“Parties who elect to use different times of payment . . . must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.”).

make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had.”<sup>41</sup>

With regard to the issuance of a license, PACA section 4(d) (7 U.S.C. § 499d) provides in pertinent part:

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 8(b) or is a person who, or is was responsibly connected with a person who:

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension.

7 U.S.C. § 499d(b)(A). Section 4(d) (7 U.S.C. § 449d) also provides:

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . . If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant . . . prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter . . . the Secretary may refuse to issue a license to the applicant.

7 U.S.C. § 499d(d).

PAC section 8 (7 U.S.C. § 499h), which governs grounds for license suspension or revocation of a license, states in relevant part:

**(a) AUTHORITY OF SECRETARY**

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed

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<sup>41</sup> 7 C.F.R. § 499b(4).

ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

**(b) UNLAWFUL EMPLOYMENT OF CERTAIN PERSONS . . .**

Except with the approval of the Secretary, no licensee shall employ any person, or any person who has been responsibly connected with any person—

- (1) Whose license has been revoked or is currently suspended by order of the Secretary . . . .

7 U.S.C. § 499h(a), (b). Pursuant to PACA section 1 (7 U.S.C. § 499a), “[t]he terms ‘employ’ and ‘employment’ mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.”<sup>42</sup>

Further, “PACA also includes a *respondeat superior* provision, which deems the acts of a licensee’s agents that fall within the scope of their employment to be the acts of the licensee.”<sup>43</sup>

Section 16 (7 U.S.C. § 499p) provides:

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. § 499p.

**Discussion**

Failure to pay timely and failure to pay for perishable agricultural commodities is a very serious violation of section 2(4) of the Act, for which license denial is appropriate.<sup>44</sup> Where

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<sup>42</sup> 7 U.S.C. § 499a(b)(10); *see also* 7 C.F.R. § 46.2(ee)(5) (“*Employ* and *employment* mean any affiliation of any person with the business operations of a licensee, with or without compensation, including ownership or self-employment.”).

<sup>43</sup> *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 685 (D.C. Cir. 2007).

<sup>44</sup> *See Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996); *Tony Kastner & Sons Produce Co.*, 51 Agric. Dec. 741, 745-46 (U.S.D.A. 1992).

payment for produce purchases is concerned, it has been long held that “the Act calls for payment – not excuses.”<sup>45</sup>

In this case, Respondent has not made full payment promptly to the twenty-one sellers in accordance with PACA; rather, Respondent has set forth defenses “excusing” its failures to pay. Respondent claims that only ten of the twenty-one sellers are “known” to Respondent; that Respondent did business with the “known” sellers *only*; and that at the time the Answer was filed, these ten sellers “ha[d] been paid” or were in the “process of being paid” per “arrangements” made between the sellers and Respondent.<sup>46</sup> Respondent argues that the remaining twelve sellers are *not* known to Respondent; that Respondent never purchased produce from these twelve sellers; and that any produce that was purchased from these twelve sellers was purchased by the fraud of a third party.<sup>47</sup>

#### **I. Respondent’s “Approved” Sellers**

During the hearing, Respondent referred to the following ten entities as the “approved” sellers: Fruitco Corporation; Circus Fruits Wholesale Corp.; Northeast Banana Corp.; Banana Distributors of NY, Inc.; US Fresh; Dr. Produce; Gaetan Bono; Lawrence J. Lapid, Inc.; Exp. Group, LLC; and Exclusive Produce, Inc. Respondent argues that these ten sellers have been paid, are in the process of being paid, or that arrangements have been made for payment.<sup>48</sup> However, the evidence in this case shows that Respondent failed to pay promptly all but one of these sellers in accordance with PACA and, as of the date of the hearing, failed to make full

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<sup>45</sup> *The Caito Produce Co.*, 48 Agric. Dec. 602, 615 (U.S.D.A. 1989); *see, e.g., Finer Food Sales Co. v. Block*, 708 F.2d 774, 781 (D.C. Cir. 1983); *Veg-Mix, Inc.*, 44 Agric. Dec. 1583, 1591-92 (U.S.D.A. 1985).

<sup>46</sup> Answer ¶ 3 at 1-2.

<sup>47</sup> *Id.* ¶ 4 at 2-3, 5.

<sup>48</sup> *See* Respondent’s Post-Hearing Brief at 7.

payment to six of these ten sellers.<sup>49</sup>

#### Fruitco Corporation

As of the time of hearing, Respondent had paid only one of the sellers – Fruitco Corporation (“Fruitco”) – in accordance with PACA.<sup>50</sup> (b) (6), an employee of Fruitco, was interviewed at Fruitco Corporation’s place of business by PACA Marketing Specialist Steve Seo on April 24, 2019.<sup>51</sup> Ms. (b) (6) stated that when doing business with Respondent, Fruitco always dealt with Koji Ueno.<sup>52</sup> At hearing, Respondent provided a letter from Wilma Banda, Controller of Fruitco, stating that Respondent “had never been delinquent on payments” to Fruitco.<sup>53</sup> During her in-person interview, (b) (6) had stated that the letter was written because Respondent was in good standing in terms of payment and there was no history of payment issues.<sup>54</sup> (b) (6) also provided a cancelled check showing that the invoices listed in the Complaint were paid.<sup>55</sup> Furthermore, Complainant acknowledges Respondent’s full and timely payment.<sup>56</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent did not fail to make full payment promptly to Fruitco Corporation, as alleged in the Complaint.<sup>57</sup>

#### Circus Fruits Wholesale Corp.

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<sup>49</sup> See CX23-CX43; *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998).

<sup>50</sup> See CX23 ¶ 9; CX26.

<sup>51</sup> CX23 ¶ 9

<sup>52</sup> *Id.*

<sup>53</sup> RX2 at 6; see Tr. II at 55.

<sup>54</sup> CX23 ¶ 9.

<sup>55</sup> CX26.

<sup>56</sup> See Complainant’s Brief at 17.

<sup>57</sup> See Complaint ¶ III at 3, Attachment A at 2.

Respondent paid its debt to Circus Fruits Wholesale Corp. (“Circus Fruits”) in full; however, payment was made five to ten days past the fourteen-day payment terms the parties had agreed upon.<sup>58</sup> (b) (6) President of Circus Fruits, was interviewed by PACA Marketing Specialist Steve Seo at his place of business on April 23, 2019.<sup>59</sup> (b) (6) stated that when doing business with Respondent, he always dealt with Koji and “Chino,”<sup>60</sup> Koji’s brother.<sup>61</sup> At hearing, Respondent provided a letter from (b) (6) stating that Respondent had “never been delinquent on payments” to Circus Fruits.<sup>62</sup> During the in-person interview, however, (b) (6) stated that he wrote the letter for Respondent because while Respondent “doesn’t always pay Circus for produce on time,” Respondent “eventually” pays Circus Fruits.<sup>63</sup> (b) (6) stated that there are or were no written credit agreements extending payment terms for produce purchased by Respondent beyond the fourteen-day terms stated on the Circus Fruits’s invoices.<sup>64</sup>

Pursuant to the Regulations, parties “may elect to use different times of payment than” the default ten days called for by the Act; however, in order to constitute “full payment promptly,” payment must be made “within the agreed upon time.”<sup>65</sup> Here, Respondent made payment after the agreed upon fourteen days. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Circus Fruits in

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<sup>58</sup> See CX23 ¶ 5; RX1 at 13.

<sup>59</sup> CX 23 ¶ 5.

<sup>60</sup> *Id.*

<sup>61</sup> Tr. I at 26; Tr. II at 13.

<sup>62</sup> RX2 at 2; see Tr. II at 53.

<sup>63</sup> CX23 ¶ 5.

<sup>64</sup> *Id.*

<sup>65</sup> 7 C.F.R. § 46.22(a)(11).

violation of PACA.

Northeast Banana Corp.

Respondent paid Northeast Banana Corp. (“Northeast Banana”) the debt listed in the Notice to Show Cause and Complaint in full; however, payment was made ten to twenty days past the thirty-day payment terms agreed to by the parties.<sup>66</sup> (b) (6), owner of Northeast Banana, was interviewed at Northeast Banana Corp.’s place of business on April 23, 2019 by PACA Marketing Specialist Steve Seo.<sup>67</sup> (b) (6) stated that the payment terms for all produce sold to Respondent were thirty days at maximum.<sup>68</sup> (b) (6) provided evidence of all payments made for the debt listed in the Notice to Show Cause and Complaint in this case; the evidence shows that all payments have been made for the debt listed, but after the thirty-day payment terms.<sup>69</sup>

For these reasons, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Northeast Banana in violation of PACA.

Banana Distributors of NY, Inc.

Respondent paid its debt to Banana Distributors of NY, Inc. (“Banana Distributors”) in full; however, payment was made approximately thirty days past the fourteen-day payment terms agreed to by the parties.<sup>70</sup> (b) (6) accountant of Banana Distributors, was interviewed at the company’s place of business on April 24, 2019 by PACA Marketing Specialist Steve

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<sup>66</sup> CX23 ¶ 8; RX1 at 40.

<sup>67</sup> CX23 ¶ 8.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*; see CX13 at 116-31.

<sup>70</sup> See CX23 ¶ 10; CX27; RX1 at 6.

Seo.<sup>71</sup> (b) (6) stated that when doing business with Respondent, the company always dealt with Koji Ueno or “Chino,” Mr. Ueno’s brother.<sup>72</sup> (b) (6) stated that there are or were no written credit agreements extending payment terms for produce purchased by Respondent beyond the fourteen-day terms stated on Banana Distributors’ invoices.<sup>73</sup> (b) (6) stated Respondent made payments timely when it began to do business with Banana Distributors but that Respondent subsequently started to fall behind.<sup>74</sup> (b) (7)(A) provided copies of three CFK Produce Corp. checks for sale/order invoices 120015, 120058, 120183, and 120234 (all invoices for debt listed in the Notice to Show Cause and Complaint in this case), signed by Katherine De La Rosa.<sup>75</sup> These orders/invoices were paid past the fourteen-day period, according to (b) (6), but were paid in full.<sup>76</sup>

Pursuant to the Regulations, parties “may elect to use different times of payment than” the default ten days called for by the Act; however, in order to constitute “full payment promptly,” payment must be made “within the agreed upon time.”<sup>77</sup> Further, the parties “must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.”<sup>78</sup> Respondent’s payment was made after the agreed upon fourteen days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates that Respondent failed to make full payment

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<sup>71</sup> CX23 ¶ 10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; see CX27.

<sup>77</sup> 7 C.F.R. § 46.22(a)(11).

<sup>78</sup> *Id.*

promptly to Banana Distributors in violation of PACA.

#### US Fresh

As of at least April 24, 2019, Respondent failed to pay US Fresh \$11,020.00 of the original \$30,787.50 in produce debt owed to US Fresh as listed in Appendix A to the Complaint.<sup>79</sup> Although US Fresh was partially paid, the partial payments were made past the twenty-one-day payment terms as stated on the US Fresh invoices in evidence.<sup>80</sup> Also, as of at least April 24, 2019, additional produce debt owed to US Fresh by Respondent (not listed in Appendix A to the Complaint in this case), in the amount of \$7,641.50, was thirty-one to forty-five days past due.<sup>81</sup>

(b) (6), accounts receivable manager of US Fresh, and (b) (6), controller of US Fresh, were interviewed at the company's place of business on April 24, 2019 by PACA Marketing Specialist Steve Seo.<sup>82</sup> Both (b) (6) and (b) (6) stated that when doing business with Respondent, they dealt with Koji Ueno or "Chino," Mr. Ueno's brother.<sup>83</sup> Both also stated that at least \$11,020.00 of the produce debt listed in the Complaint in this case remained unpaid and past due and indicated which invoices listed in the Complaint remained unpaid as of the time of the interview.<sup>84</sup> They also stated that approximately \$7,000.00 in additional debt (not listed in the Complaint) was currently unpaid and thirty-one to forty-five

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<sup>79</sup> See CX13 at 105-11; CX23 ¶ 11.

<sup>80</sup> CX13 at 96-104, 112-14; CX23 ¶ 11.

<sup>81</sup> CX23 ¶ 11; CX28.

<sup>82</sup> CX23 ¶ 11.

<sup>83</sup> *Id.*; see Tr. I at 70-71.

<sup>84</sup> CX13 at 105-11.

days past due.<sup>85</sup> In addition, (b) (6) and (b) (6) stated that there were no written agreements to pay for produce past the twenty-one days listed on US Fresh invoices and indicated which invoices listed in the Complaint were paid but were paid late.<sup>86</sup> Ms. Persaud provided a statement showing that as of April 24, 2019, Respondent owed \$20,372.00 in total produce debt and that \$7,641.50 was thirty-one to forty-five days past due.<sup>87</sup>

Pursuant to the Regulations, parties “may elect to use different times of payment than” the default ten days called for by the Act; however, in order to constitute “full payment promptly,” payment must be made “within the agreed upon time.”<sup>88</sup> Further, the parties “must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.”<sup>89</sup> Respondent’s payment was made after the agreed upon fourteen days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to US Fresh in violation of PACA.

#### Dr. Produce

As of at least April 24, 2019, Respondent failed to pay Dr. Produce the entire produce debt of \$1,600.00 listed in Appendix A to the Complaint.<sup>90</sup> (b) (6), an accounts-receivable employee of Dr. Produce, was interviewed at the company’s place of business on

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<sup>85</sup> CX23 ¶ 11.

<sup>86</sup> *Id.*; see CX23 at 96-104, 112-14.

<sup>87</sup> CX23 ¶ 11; see CX28.

<sup>88</sup> 7 C.F.R. § 46.22(a)(11).

<sup>89</sup> *Id.*

<sup>90</sup> CX23 ¶ 12; see CX29.

April 24, 2019 by PACA Marketing Specialist Steve Seo.<sup>91</sup> (b) (6) stated that the debt listed on the Complaint in this case was still past due and owed to Dr. Produce<sup>92</sup> and provided invoices unpaid by Respondent at the time of the interview.<sup>93</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Dr. Produce in violation of PACA.

Gaetan Bono

As of the time it filed its initial posthearing Brief, Respondent failed to pay Gaetan Bono the entire produce debt of \$16,091.00 listed in Appendix A to the Complaint.<sup>94</sup> At hearing, Respondent introduced checks purportedly paid to Gaetan Bono for produce purchases; however, not one of these checks was for the produce listed in Appendix A to the Complaint.<sup>95</sup>

During the hearing, Respondent offered the explanation that these checks for produce *other than* that listed in Appendix A to the Complaint somehow shows that the payments for the actual debt listed in Appendix A were, in fact, made:

If we're showing current payments made, it stands to reason that the old invoices were paid as well . . . It would have been extremely burdensome . . . for us to produce all the checks paid to any of these [sellers] based on the history of the payments. All of these show the current payment and show they're up to date.

Tr. II at 43. As I noted during the hearing, Respondent's logic is faulty—a payment made later on a *different* invoice does not show that a payment for an earlier invoice was made.<sup>96</sup> Moreover, Respondent provided these invoices to Marketing Specialist Steve Seo at the time of the

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<sup>91</sup> CX23 ¶ 12.

<sup>92</sup> *Id.*

<sup>93</sup> *See* CX29.

<sup>94</sup> *See* CX4 at 3; CX5; CX13 at 26-29; Tr. II at 196.

<sup>95</sup> RX1 at 30-35; *See* Tr. II at 110-11, 196.

<sup>96</sup> *See* Tr. II at 43-45.

investigation, when Mr. Seo specifically asked for all of Respondent's unpaid invoices.<sup>97</sup> If these invoices *were* paid, Respondent needed only to show that by producing the checks or other evidence of payment of the invoices. As of the date of hearing and to date, Respondent has not shown that any payments for the \$16,091.00 listed in Appendix A to the Complaint were made. The money is still past due and owed by Respondent.

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Gaetan Bono in violation of PACA.

Lawrence J. Lapide, Inc.

As of at least April 23, 2019, Respondent failed to pay Lawrence J. Lapide, Inc. ("Lapide") the entire produce debt of \$8,120.00 listed in Appendix A to the Complaint.<sup>98</sup> (b) (6) (b) (6) accountant of M1 Packing (a newly formed entity organized by affiliates of Lapide) was interviewed at the Lapide place of business on April 23, 2019 by PACA Marketing Specialist Steve Seo.<sup>99</sup> (b) (6) provided copies of three CKF Produce Corp. Checks totaling \$15,920.00 and signed by Katherine De La Rosa, which were in payment of other loads of produce purchased around the time of the debt incurred as listed in the Complaint in this case.<sup>100</sup> Ms. (b) (6) also provided an accounts receivable report that shows that as of April 23, 2019, an open balance of \$8,120.00 remained unpaid and stated in an accompanying email that the \$8,120.00 debt listed in the Complaint was still owed.<sup>101</sup> The due date for this open balance appears as

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<sup>97</sup> See Tr. I at 35, 106.

<sup>98</sup> CX13 at 25; CX23 ¶ 7; CX25.

<sup>99</sup> CX23 ¶ 7.

<sup>100</sup> CX25.

<sup>101</sup> See *id.*

August 11, 2017 on the accounts receivable report.<sup>102</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Lawrence J. Lapide, Inc. in violation of PACA.

Exp. Group, LLC

As of at least April 24, 2019, Respondent failed to pay Exp. Group LLC (“Exp. Group”) \$191,226.25 of the original \$255,945.75 owed in produce debt, as listed in Appendix A to the Complaint.<sup>103</sup> Complainant states it “has determined that partial payments of the \$255,945.75 were made,” but Respondent has not provided any evidence of payments of invoices or debt at issue.<sup>104</sup> Instead, Respondent has provided checks for purported payment of other invoices and debt owed to Exp. Group.<sup>105</sup>

(b) (6) CEO of Exp. Group, was interviewed at the company’s place of business on April 24, 2019 by PACA Marketing Specialist Steve Seo.<sup>106</sup> (b) (6) stated that when doing business with Respondent, he dealt with Koji Ueno or “Chino,” Mr. Koji Ueno’s brother.<sup>107</sup> (b) (6) stated that \$121,226.25 of the produce debt listed in the Complaint remained unpaid and past due.<sup>108</sup> (b) (6) also stated there were no written agreements to pay for produce past the ten days listed on Exp. Group invoices.<sup>109</sup> (b) (6) provided a “customer statement inquiry” showing the amounts and invoices that were unpaid and paste due

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<sup>102</sup> *Id.*; CX23 ¶ 7.

<sup>103</sup> *See* CX4 at 3; CX5; CX13 at 7-24; CX22 ¶ 6(a); Tr. I at 30.

<sup>104</sup> Complainant’s Brief at 23.

<sup>105</sup> *See* RX1 at 16-21.

<sup>106</sup> CX23 ¶ 13; CX13 at 11-24; CX30; Tr. I at 109-11.

<sup>107</sup> CX23 ¶ 13.

<sup>108</sup> CX22 ¶ 6(a).

<sup>109</sup> CX23 ¶ 13.

as of the date of the interview<sup>110</sup> and further confirmed which invoices were paid as of the date of the interview.<sup>111</sup>

Pursuant to the Regulations, parties “may elect to use different times of payment than” the default ten days called for by the Act; however, in order to constitute “full payment promptly,” payment must be made “within the agreed upon time.”<sup>112</sup> Respondent’s payment was made after the agreed upon ten days, and there were no written agreements extending the payment terms. Therefore, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Exp. Group in violation of PACA.

Exclusive Produce, Inc.

Complainant argues that Respondent failed to pay Exclusive Produce, Inc. (“Exclusive Produce”) the entire \$10,225.00 of produce debt listed in Appendix A to the Complaint.<sup>113</sup> Respondent has provided no paid checks for this vendor but did provide a letter at hearing stating that Respondent “had never been delinquent on payments for any commodities delivered to [Exclusive Produce].”<sup>114</sup> No company title for the signatory is provided in the letter along with this signature.<sup>115</sup> The letter is not credible evidence that Exclusive Produce has been paid any of the \$10,225.00 in produce debt listed in the Complaint; no checks for payment have been provided.

Moreover, each Exclusive Produce invoice provided as evidence by Complainant clearly

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<sup>110</sup> See CX30.

<sup>111</sup> See CX13 at 11-24.

<sup>112</sup> 7 C.F.R. § 46.22(a)(11).

<sup>113</sup> Complainant’s Brief at 23.

<sup>114</sup> CX2 at 5. The letter is dated March 18, 2019 and is signed by (b) (6) *Id.*

<sup>115</sup> See *id.*

states on its face: “Not paid.”<sup>116</sup> These invoices were provided to Marketing Specialist Steve Seo by Respondent at the time of the investigation, when Mr. Seo specifically asked for all of Respondent’s unpaid invoices.<sup>117</sup> Exclusive Produce is listed on Respondent’s accounts payables list as an overdue seller to which \$10,225.00 is owed, and the debt is listed as more than ninety-days past due as of November 12, 2018.<sup>118</sup> Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Exclusive Produce, Inc. in violation of PACA.

Based on the foregoing, I find that the preponderance of the evidence shows that: (1) only one of Respondent’s “approved” vendors was paid timely and in full; (2) payment was made in full to three of Respondent’s “approved” vendors, but those vendors were paid between five and thirty days past the terms agreed to by the parties; and (3) six of Respondent’s “approved” vendors were not paid in full, for more than *de minimis* amounts,<sup>119</sup> well after the hearing in this case was held. In sum, payment breakdown of the ten “approved” sellers is as follows:

Fruitco Corporation:	Paid timely and in accordance with the Act;
Circus Fruits Wholesale Corp.:	Paid in full, five to ten days late;
Northeast Banana Corp.:	Paid in full, ten to twenty days late;
Banana Distributors of NY:	Paid in full, approximately thirty days late;
US Fresh:	Owed \$11,020.00 as of April 24, 2019;
Dr. Produce:	Owed \$1,600.00 as of April 24, 2019;
Gaetan Bono:	Owed \$16,091.00;
Lawrence J. Lapide, Inc.:	Owed \$8,120.00 as of April 23, 2019;

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<sup>116</sup> See CX13 at 1-6; Tr. I at 33-35.

<sup>117</sup> See Tr. I at 31-32.

<sup>118</sup> See CX5.

<sup>119</sup> See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

Exp. Group LLC: Owed \$191,226.25 as of April 24, 2019; and  
Exclusive Produce, Inc.: Owed \$10,225.00.

Further, after the hearing, Respondent still owed a total of \$238,282.25 to six of the “approved” sellers. As the Judicial Officer ruled in *Scamcorp*,<sup>120</sup> a seminal case regarding failure to pay for produce:

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA and is not in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “no-pay” case. . . . In any “no-pay” case in which the violations are flagrant or repeated, the license of a PACA licensee, shown to have violated the payment provisions of the PACA, will be revoked.

In any PACA disciplinary proceeding in which it is shown that a respondent has failed to pay in accordance with the PACA, but is in full compliance with the PACA within 120 days after the complaint is served on that respondent, or the date of the hearing, whichever occurs first, the PACA case will be treated as a “slow-pay” case. . . . [I]n any “slow-pay” case in which the PACA Licensee is shown to have violated the payment provisions of the PACA, a civil penalty will be assessed against the PACA licensee or the license of the PACA licensee will be suspended.

*Scamcorp, Inc.*, 57 Agric. Dec. 527, 548-49 (U.S.D.A. 1998).

The Secretary’s policy of imposing severe sanctions for failures to pay is designed not only to deter produce purchasers from failing to make payment promptly; it is also designed to limit participation in the perishable agricultural commodities industry to financially responsible persons, which is one of the primary goals of PACA.<sup>121</sup> The admittedly “tough” policy has been

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<sup>120</sup> *Scamcorp, Inc.*, 57 Agric. Dec. 527 (U.S.D.A. 1998).

<sup>121</sup> See *Coosemans Specialties, Inc. v. Dep’t of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 240 (3d Cir. 2007); *H.C. MacClaren, Inc. v. U.S. Dep’t of Agric.*, 342 F.3d 584, 588 (6th Cir. 2003) (“PACA was ‘designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility.’”) (quoting *Kanowitz Fruit & Produce Co. v. U.S. Dep’t of Agric.*, No. 97-4224, 1998 WL 863340, at \*1 (2d Cir. Oct. 29, 1998)); *The Caito Produce Co.*, 48 Agric. Dec. 602, 616-17 (U.S.D.A. 1989).

consistently upheld by the federal courts.<sup>122</sup>

Respondent argues that, with regard to the ten “known” sellers, Respondent’s conduct “cannot be construed as being a willful, flagrant and repeated violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).”<sup>123</sup> In support of its assertion, Respondent claims it “has been completely up to date with . . . payments for commodities ordered and delivered by these sellers and or was up to date with their installment payment agreements with those sellers with whom they had such installment payment agreements.”<sup>124</sup> This argument has no merit. As demonstrated by the record and detailed above, Respondent owed a total of \$238,282.25 to six of the “approved” sellers at the time of hearing. And of the ten “approved” sellers, only one was paid timely. Three sellers were paid in full but paid late—between five to thirty days after the terms agreed to by the parties—and six were not paid more than *de minimis* amounts well after the hearing was held.

As for the “installment payment agreements,” the record shows that Respondent had no credit agreements with any “approved” seller past thirty days.<sup>125</sup> Complainant correctly notes

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<sup>122</sup> See, e.g., *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 690-91 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 241, 244 (3d Cir. 2007); *Hawkins v. Dep’t of Agric.*, 10 F.3d 1125, 1133-35 (5th Cir. 1993).

<sup>123</sup> Respondent’s Brief at 18.

<sup>124</sup> *Id.*

<sup>125</sup> Respondent appears to confuse the payment terms required by PACA and the requirements for a valid credit agreement under PACA. See Respondent’s Brief at 9-10. Contrary to Respondent’s apparent impression, Complainant has not held Respondent to fourteen-day payment terms for every produce seller. Under PACA, “full payment promptly” is payment “within 10 days after the day on which the produce is accepted” or, if the parties elect to use different terms of payment, “payment within the agreed upon time” so long as the agreement is reduced to writing prior to entering into the transaction and the parties “maintain a copy of the agreement in their records.” 7 C.F.R. § 46.2(aa)(5), (11).

that “the party claiming existence of such an agreement shall have the burden of proving it”<sup>126</sup> – which Respondent has failed to do here. Although Koji Ueno testified that such agreements existed, he gave no details regarding with whom, for how long, or when the agreements were entered into.<sup>127</sup> Neither Koji Ueno nor Respondent produced any evidence—written or otherwise—to support his vague testimony on the issue.

Furthermore, I find that Respondent’s violations of PACA section 2(4) were flagrant, repeated, and willful. A violation is “flagrant” where there is knowing conduct or a large number of transactions committed over a period of time.<sup>128</sup> As the total amount due exceeds \$200,000.00 for a number of knowing transactions made with nine sellers, Respondent’s violations are flagrant. Violations are “repeated” where there is more than one violation of PACA.<sup>129</sup> As the violations in this case occurred over a period of time and involve at least nine sellers, Respondent’s violations are repeated. Furthermore, the Judicial Officer has long held that where – as in the present case – there is more than one failure to make prompt payment for produce and the amount involved is more than *de minimis*, a repeated and flagrant violation of PACA exists,

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<sup>126</sup> Complainant’s Reply Brief at 3-4 (citing 7 C.F.R. § 46.2(aa)(11)); *see* 7 C.F.R. § 46.2(aa)(11) (“[T]he party claiming the existence of such an agreement for time of payment shall have the burden of proving it.”).

<sup>127</sup> *See* Tr. II at 111-13, 173-74 (testimony of Sharlene Evans).

<sup>128</sup> *See Potato Sales Co. v. Dep’t of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996) (citing, *inter alia*, 10 Harl, *Agricultural Law* § 72.09[3], p. 72–35 (1995) (“‘Flagrant’ violations have been stated to be those which are committed with knowledge of their occurrence, involve a large number of transactions, are committed over a period of time, and involve a substantial sum of money.”); *see also H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 757 (U.S.D.A. 2001), *aff’d sub nom. H.C. MacClaren, Inc. v. U.S. Dep’t of Agric.*, 342 F.3d 584 (6th Cir. 2003).

<sup>129</sup> *See Perfectly Fresh Farms, Inc. v. U.S. Dep’t of Agric.*, 692 F.3d 960, 970 (9th Cir. 2012) (“Violations that ‘did not occur simultaneously . . . must be regarded as ‘repeated’ violations.”) (quoting *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972)).

regardless of the reason for non-payment.<sup>130</sup> Finally, a violation is “willful” where “the violator: ‘(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements.’”<sup>131</sup> Here, Respondent knew or should have known it could not make prompt payment for the large amount of perishables it ordered, yet Respondent continued to make purchases over a lengthy period of time and did not pay its produce suppliers. Therefore, Respondent’s actions in this case were willful.

Given the evidence regarding the ten “approved” sellers alone,<sup>132</sup> the appropriate sanction for Respondent’s flagrant and repeated violations of PACA is revocation of Respondent’s PACA license, or publication in lieu of revocation under PACA section 8(a) (7 U.S.C. § 499h(a)) (since Respondent does not currently hold a valid active PACA license),<sup>133</sup> and denial of Respondent’s license application under PACA section 4(d) (7 U.S.C. § 499d(d)). Respondent has shown, through its many failures to pay produce sellers promptly, that it is unfit to receive a new PACA license.

## II. Respondent’s “Unapproved” Sellers

With regard to the remaining twelve “unapproved” sellers, Respondent contends that they were not known to Respondent, that Respondent never purchased produce from them, and that

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<sup>130</sup> See *The Caito Produce Co.*, 48 Agric. Dec. 602, 611, 629 (U.S.D.A. 1989); see also *Andershock Fruitland*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996).

<sup>131</sup> See *Perfectly Fresh Farms, Inc.*, 692 F.3d at 970 (quoting *Potato Sales Co. v. Dep’t of Agric.*, 92 F.3d, 800, 804 (9th Cir. 1996)).

<sup>132</sup> See *supra* Discussion, Part I.

<sup>133</sup> See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

any produce that was purchased from them was done by fraud of a third party.<sup>134</sup> These twelve sellers are: Agri-Mondo; Produce Connection; Leonard's Express; Ryeco, LLC; B&M Avocados, LLC; Trufresh; Ag Grower Sales, LLC; Paulmex International, Ltd; OTC Produce, LLC; Roland Marketing; Higueral Produce, Inc.; and Ergo Produce, Inc. According to Respondent, these produce purchases were made primarily by Eran "Ryan" Evanaim and Elpidio "Chino" Ueno, neither of whom were Respondent's employees.<sup>135</sup> The aggregate of the evidence shows otherwise.

Although it makes numerous factual assertions, Respondent never once cites any portion of the record in purported support of these assertions. There is no citation to any portion of the transcript, nor to any exhibit. There is not even any citation to any portion of Complainant's initial brief, or any other filing made by Complainant, as might be done if Respondent was contending that Complainant admitted to some factual matter. A mere assertion by a litigant of a fact on brief does nothing to prove that fact.

Given Respondent's failure to provide citations to the record in support of its factual contentions, it would be proper in this Decision to ignore or to reject out of hand as unsupported each of those contentions. However, because the record is before me, in the potential aid of proceedings on appeal, I will address those arguments herein to some extent.

First, Respondent claims that the purchases of produce from the twelve "unapproved" sellers were made primarily by Elpidio "Chino" Ueno, (Koji Ueno's brother) and Eran "Ryan" Evanaim.<sup>136</sup> Respondent argues:

Further and moreover, it is submitted that the Respondent cannot be held to be

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<sup>134</sup> See Answer ¶ 4 at 2-3, 5; Respondent's Brief at 5; Tr. II at 30.

<sup>135</sup> See Respondent's Brief at 6, 12, 15, 17; Respondent's Reply Brief at 6.

<sup>136</sup> See Respondent's Brief at 6, 12-13; Respondent's Reply Brief at 8.

liable for the actions of Elpedio “Chino” Ueno, Eran “Ryan” Evanaim or any of the other individuals who were involved with the transactions with the twelve (12) unknown vendors under Section 16 of the PACA or under the common law doctrine of respondeat superior because they were not operating within the scope of their employment with, the Respondent as it is legally defined.

Respondent’s Reply Brief at 11.

Although Respondent denies that Chino and Ryan were employees of Respondent, the evidence shows that both individuals were employed by Respondent under PACA’s definition of employment.<sup>137</sup> PACA section 1(b)(10) (7 U.S.C. § 499a(b)(10)) and section 46.2(ee) of the Regulations (7 C.F.R. § 46.2(ee)) both state that the terms “employ” and “employment” mean “any affiliation of any person with the business operations of a licensee, with or without compensation.”<sup>138</sup>

Here, the record demonstrates that Elpidio “Chino” Ueno was an employee of Respondent by these definitions.<sup>139</sup> Elpidio “Chino” Ueno held himself out to all twelve “unapproved” sellers to be at least an employee—and even in charge at times—of Respondent.<sup>140</sup>

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<sup>137</sup> See Respondent’s Reply Brief at 5-10.

<sup>138</sup> 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

<sup>139</sup> See *Bama Tomato Co. v. U.S. Dep’t of Agric.*, 112 F.3d 1542, 1545-46 (11th Cir. 1997); see, e.g., *County Produce, Inc.*, 55 Agric. Dec. 596, 610-11 (U.S.D.A. 1996) (holding that “[t]he fact that [an employee] received no payment, no profit, and no promise of future employment . . . is legally irrelevant, because the statute plainly states . . . ‘employment’ means any affiliation, with or without compensation, ownership, or self-employment[.]”) (“USDA has held that ‘[t]he word ‘any’ is a broad and comprehensive terms that includes all kinds of affiliation – whether minimum or maximum; whether deliberate or not.”) (quoting *Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 (U.S.D.A. 1986), *aff’d per curiam*, 82 F.2d 162 (D.C. Cir. 1987)); *DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1701-02 (U.S.D.A. 1994); *ABL Produce, Inc.*, 52 Agric. Dec. 1578, 1590-92 (U.S.D.A. 1993).

<sup>140</sup> See CX23-24; CX33-35; CX37; see also CX23 ¶ 3 at 1 (declaring that (b) (6), Secretary and Treasurer of the Brooklyn Terminal Marketing Cooperative, stated he “was aware of CKF and stated to his knowledge ‘it was run’ by Koji and ‘Chino’”), ¶ 6 at 1 (declaring that (b) (6), owner of T&C Tropical Products, Inc., whose place of business is also located in Brooklyn Terminal Market, “stated that to his knowledge, Koji Ueno owns CKF and that Elpidio Ueno either also owns, or helps ‘run’ the business”).

He also held himself out to be an employee and produce salesman of Respondent to at least four of the “approved” vendors.<sup>141</sup>

During an on-site investigation, Koji Ueno asked his brother to talk to and assist the PACA investigators,<sup>142</sup> and Chino assisted investigators as Respondent’s “controller” or manager during the entire on-site investigation.<sup>143</sup> The evidence demonstrates that Elpidio “Chino” Ueno specifically indicated to PACA investigators that he was “in charge” and stated that he “ran the show.”<sup>144</sup> During that time, employees came to Elpidio “Chino” Ueno “throughout the day” and asked him how to handle various items of business.<sup>145</sup> He also received calls from produce sellers.<sup>146</sup>

Furthermore, Koji Ueno’s testimony about his brother further demonstrates that Elpidio “Chino” Ueno was employed by Respondent. Although Koji Ueno denied that Chino worked for the company, he also admitted that Chino “comes occasionally and gives me assistance because he has a lot of business experience. And he is . . . very experience[d] in marketing and helps me with ideas when I need new ideas for the business.”<sup>147</sup> That Chino purportedly did not receive compensation from the company is not germane to whether or not he was an “employee” under PACA.<sup>148</sup> Further, Koji Ueno testified at hearing that at least one “approved” seller purchased

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<sup>141</sup> See CX23. Elpidio “Chino” Ueno held himself out as Respondent’s employee and produce salesman to Circus Fruits Wholesale Corp.; Banana Distributors of New York, Inc.; US Fresh; and EXP. Group, LLC. *See id.*

<sup>142</sup> Tr. II at 21.

<sup>143</sup> *Id.* at 180-83.

<sup>144</sup> See Tr. I at 24-26, 29, 89, 98, 174, 179, 186.

<sup>145</sup> *Id.* at 98.

<sup>146</sup> *Id.*

<sup>147</sup> Tr. II at 13-14.

<sup>148</sup> See 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

produce from “Chino”<sup>149</sup> and indicated that several others either purchased produce from “Chino” (or at least believed they were purchasing produce from “Chino”).<sup>150</sup> As noted, both PACA itself and the implementing Regulations are explicit that “employment” is “any affiliation of any person with the business operations of a licensee, with or without compensation.”<sup>151</sup> Based on the aggregate of evidence demonstrating his affiliation with the business operations of Respondent, I find that Elpidio “Chino” Ueno was an employee of Respondent.

Similarly, the record establishes that Eran “Ryan” Evanaim was an employee of Respondent under PACA and the Regulations. The evidence shows that each of the twelve “unapproved” vendors communicated with “Ryan” about the produce purchased in this case and the debt owed for the purchases of that produce.<sup>152</sup> On April 25, 2019, Marketing Specialist Steve Seo conducted a telephone interview with “Eran Evanaim.”<sup>153</sup> During the call, Mr. Evanaim acknowledged that he was involved with Respondent and stated he “helped out” with “marketing” and purchasing produce in 2017 and 2018.<sup>154</sup> Mr. Evanaim stated that all produce he purchased during that period was authorized by Respondent.<sup>155</sup> This aggregate of evidence demonstrates that “Ryan” was an employee of Respondent in this case.<sup>156</sup>

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<sup>149</sup> See Tr. II at 92; CX13 at 1.

<sup>150</sup> See Tr. II at 92-94.

<sup>151</sup> 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee).

<sup>152</sup> See CX23; CX24.

<sup>153</sup> CX23 ¶ 14. The call was received from the phone number (b) (6). Mr. Seo performed a trace of the call using software available to him and determined that the number was registered to and associated with Eran Evanaim. CX31.

<sup>154</sup> CX23 ¶ 14.

<sup>155</sup> *Id.*

<sup>156</sup> See 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee); *Bama Tomato Co. v. U.S. Dep’t of Agric.*, 112 F.3d 1542, 1544-45, 1549 (11th Cir. 1997).

Respondent's testimony also suggests "Ryan" was an employee of Respondent and renders the "fraud by Ryan" claim contrary to the preponderance of the evidence. At one point during the hearing, Koji Ueno testified that he told sellers "he did not know Ryan" at all,<sup>157</sup> but Koji Ueno then also testified that he indeed knew Ryan and that Ryan had worked for Respondent "a few years ago, in 2016" as a middle man for Respondent to buy produce.<sup>158</sup> For this reason, and based on the evidence regarding the twelve "unapproved" sellers discussed below, I find that Koji Ueno's testimony regarding Ryan's non-employment is not credible. The record shows that Ryan was affiliated with Respondent's business operations and therefore an employee under the Act and Regulations.<sup>159</sup>

Second, Respondent raises an argument in its Reply Brief that it never previously—but could have—raised: that the named individuals were not acting within the scope of their employment for Respondent because they were working for "CKF II," a "completely separate corporate entity."<sup>160</sup> Respondent contends:

They were operating under the name of a completely separate corporate entity CKF II, which is a corporation organized and registered in the State of New York. Kathrine De La Rosa is listed as the President and sole shareholder of CKF II. The Respondent is not and was never an officer, shareholder, or never had any administrative or financial connection to CKF II.

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<sup>157</sup> Tr. II at 69.

<sup>158</sup> *See id.* at 19, 12-27, 86-87, 108-09, 125-26. *See also* RX6 (Respondent's Police Report Statement) ("On a couple of occasions in 2016, our company, upon the recommendation of my brother Elpidio, used [Ryan] as a middleman to procure some bargain commodities for us from vendors that he was familiar with.").

<sup>159</sup> *See* 7 U.S.C. § 499a(b)(10); 7 C.F.R. § 46.2(ee); *Bama Tomato Co. v. U.S. Dep't of Agric.*, 112 F.3d 1542, 1544-45, 1549 (11th Cir. 1997).

<sup>160</sup> Respondent's Reply Brief at 7. Respondents state that CKF II "is a corporation organized and registered in the State of New York." *Id.* However, official notice is taken that a "PACA License Search" of the AMS ePACA Portal reveals no PACA license has been issued to the business. *See* 7 C.F.R. § 1.141(h)(6); *ePACA*, USDA.GOV, [https://apps.mrp.usda.gov/public\\_search](https://apps.mrp.usda.gov/public_search) (last visited March 25, 2020).

Respondent's Reply Brief at 6. By neglecting to raise this argument until its Reply Brief, Respondent sandbagged Complainant on this contention and thereby denied Complainant the opportunity to respond thereto.

Nonetheless, Respondent's argument—for which absolutely no support has been offered—fails. Respondent gives no explanation as to how Chino's and Ryan's alleged business with CKF II would negate their affiliation with Respondent. It would be illogical to accept that Respondent CKF Produce and CKF II were acting as separate entities where, as the record has established here: (1) all of the disputed transactions involved either Chino or Ryan, who were each employees of CKF Produce;<sup>161</sup> (2) copies of all the challenged invoices were supplied by CKF Produce, from the company's own records;<sup>162</sup> (3) in cases where inspections took place, those inspections were ordered and paid for by CKF Produce;<sup>163</sup> (4) in some instances, partial payments were made by CKF Produce;<sup>164</sup> (5) the produce in question was shipped to CKF Produce's address at Brooklyn Terminal Market;<sup>165</sup> and (6) the president and sole shareholder of CKF II, Katherine De La Rosa, was also the highest paid employee of CKF Produce.<sup>166</sup>

Third, Respondent argues that Koji Ueno, Respondent's principal and 100% owner, did not authorize, was not aware of, and was not involved in the purchase of commodities from the twelve "unknown" sellers.<sup>167</sup> According to Respondent, "all of these sellers corroborated Mr.

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<sup>161</sup> See *supra* pages 29 through 32.

<sup>162</sup> See CX4 at 3; CX13 at 64; Tr. I at 35, 79, 88, 98, 106, 174, 179, 186.

<sup>163</sup> See, e.g., CX13 at 35, 36, 48, 50, 55, 59; CX40 at 147-48, 155-58; CX40 at 181, 185; CX44 at 1-3, 4, 6, 8.

<sup>164</sup> See CX13 at 38-63; CX33; CX39; Complainant's Brief, Attachment 2.

<sup>165</sup> See Tr. I at 122-25, 141-42, 191-92; CX1; CX4 at 3; CX13 at 31-33.

<sup>166</sup> See Respondent's Reply Brief at 6; RX3.

<sup>167</sup> See Respondent's Brief at 12.

Ueno’s assertions that he was not the person with whom they had dealt with in negotiating these transactions. In fact, none of these sellers had even heard of Koji Ueno.”<sup>168</sup> However, Respondent cites no record evidence to support its contention, and—as delineated below—the record shows that Koji Ueno personally knew of and was involved in transactions with several of the twelve “unapproved” sellers. Given that Respondent CKF Produce ordered inspections related to the disputed transactions, made partial payments from its own bank account, and received shipments of the produce at its company address, it defies logic that Koji Ueno would not have been involved in, or at least aware of, these transactions.<sup>169</sup> Moreover, Respondent specifically admits that “these transactions appear to have taken place on [Mr. Ueno’s] watch, and apparently involved individuals who are or were employees of his company, and who were under his direct supervision.”<sup>170</sup>

Further, Respondent contends that its conduct, as it relates to the twelve “unknown” sellers, cannot constitute a willful violation of PACA because Respondent’s principal, Mr. Koji Ueno, did not have actual knowledge of what those employees were doing. Respondent asserts that a PACA violation requires more than a principal/agent relationship between a PACA licensee and an employee and that, “as a matter of practicality and common sense, one cannot possibly formulate the intention to carry out an act that he is not aware of.”<sup>171</sup>

Respondent cites the Judicial Officer’s decision in *Post & Taback, Inc.*,<sup>172</sup> contending that the Judicial Officer’s reasoning was faulty when the Judicial Officer concluded “[t]he

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<sup>168</sup> Respondent’s Brief at 12.

<sup>169</sup> See *supra* notes 163 through 165 and accompanying text.

<sup>170</sup> Respondent’s Brief at 14.

<sup>171</sup> *Id.* at 3.

<sup>172</sup> 62 Agric. Dec. 802 (U.S.D.A. 2003).

knowledge that can be attributed to a corporate PACA licensee, such as the Respondent is not limited to that which is known by its officers, owners and directors.”<sup>173</sup> But, as a presiding administrative law judge, I am bound by that Judicial Officer’s reasoning and determination in that decision.<sup>174</sup> Moreover, I agree with that reasoning and determination. Here, as in *Post & Taback*, the PACA respondent licensee is a corporation. The knowledge and actions of its employees and agents are attributed to the licensee/PACA violator, regardless of what its officers, directors, and owners actually knew or did not know.<sup>175</sup> Many other binding USDA precedents come to the same conclusion as *Post & Taback*.<sup>176</sup> In the current circumstances, the

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<sup>173</sup> *Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (U.S.D.A. 2003).

<sup>174</sup> In addition, the Judicial Officer’s decision was affirmed by the Court of Appeals for the D.C. Circuit. See *Post & Taback, Inc. v. Dep’t of Agric.*, 123 F. App’x 406 (D.C. Cir. 2005).

<sup>175</sup> See *B.T. Produce Co.*, PACA-D Docket No. 02-0023, 2007, WL 1378157, at \*\*33-34 (U.S.D.A. May 4, 2007) (“Liability under section 16 of the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees.”).

<sup>176</sup> See, e.g., *Kleiman & Hochberg, Inc. v. U.S. Dep’t of Agric.*, 497 F.3d 681, 688-89 (D.C. Cir. 2007) (holding that the knowing and willful bribes of an employee were deemed to be the knowing and willful bribes by that employee’s company) (“As we held in *Post & Taback*, ‘the plain language of [7 U.S.C. § 499p] provides no escape hatch for merchants who allege ignorance of their employee’s misconduct’”) (quoting *Post & Taback, Inc. v. U.S. Dep’t of Agric.*, 123 F. App’x 406, 408 (D.C. Cir. 2005)); *Koam Produce, Inc. v. United States*, 269 F. App’x 35, 36-37 (D.C. Cir. 2005) (rejecting argument that the Secretary lacked “the authority to impute [the respondent’s] intentional misconduct to the corporation under § 499p of PACA”) (“This Court has already specifically held that ‘[an employee’s] acts – bribing USDA inspectors – are deemed the acts of [the corporation] under PACA.’”) (quoting *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123, 130 (2d Cir. 2003)); *H.C. MacClaren, Inc. v. U.S. Dep’t of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003) (holding that where employees knowingly and willfully violate PACA, those knowing and willful violations “are deemed to be knowing and willful violations” by the corporation); *ABL Produce, Inc. v. U.S. Dep’t of Agric.*, 25 F.3d 641, 644 (8th Cir. 1994) (“ABL cannot claim to be innocent and unaware of Lombardo’s actions because, at a minimum, it (through its agents) knew or should have known that Lombardo was conducting business dealings on its behalf with both suppliers and customers.”); *B.T. Produce Co.*, 66 Agric. Dec. 774, 809 (U.S.D.A. 2007) (“Therefore, I conclude section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee’s agents and employees and [the employee’s] willful violations of the PACA are B.T. Produce’s willful violations of the PACA.”).

test of willfulness is met as demonstrated by the record.

Agri-Mondo

Complainant asserts that Respondent failed to pay Agri-Mondo the entire produce debt of \$8,816.25 listed in Appendix A to the Complaint.<sup>177</sup> The evidence shows that Respondent failed to pay this seller for produce purchased between December 7, 2017 and February 7, 2018.<sup>178</sup> As of at least May 3, 2019, the entire produce debt of \$8,816.25 owed to Agri-Mondo remained unpaid by Respondent.<sup>179</sup>

On April 29, 2019, Marketing Specialist Steve Seo conducted a telephone interview with (b) (6) of Agri-Mondo.<sup>180</sup> (b) (6) stated that when doing business with Respondent, he dealt with “Ryan” or “Chino.”<sup>181</sup> On May 3, 2019, (b) (6) provided Mr. Seo an email exchange (b) (6) had with Respondent in September and October 2018 at the email address (b) (6).<sup>182</sup> (b) (6) also provided a copy of a bounced check in the amount of \$8,000.00 written to Agri-Mondo from a CKF Produce II Corp. account—but that check was not in payment for the debts listed in the Complaint.<sup>183</sup> The check was signed by Katherine De La Rosa, who is uncontestedly Respondent CKF’s employee.<sup>184</sup>

Several items of evidence in the record render Respondent’s claims that it “never

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<sup>177</sup> Complaint; Complainant’s Brief at 29.

<sup>178</sup> See CX4 at 3; CX22 ¶ 6(b); CX13 at 30-33. See *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998). “Appendix A” to the Complaint deems “date of purchase” the date of acceptance of the produce and not necessarily the date printed on the invoice.

<sup>179</sup> See CX13 at 30-33; CX23 ¶ 17; CX34; Tr. I at 66.

<sup>180</sup> CX23 ¶ 17.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; CX34.

<sup>183</sup> See CX34.

<sup>184</sup> *Id.*

purchased produce” from Agri-Mondo, has never “done business” with Agri-Mondo, and has never even *heard* of Agri-Mondo, incredible. The Agri-Mondo invoices were provided to Mr. Seo by Respondent from its own records at the time of the on-site investigation, after Respondent was specifically asked for unpaid invoices.<sup>185</sup> The invoices themselves state that the produce was shipped to Respondent at 29-31 Brooklyn Terminal (Respondent’s license address).<sup>186</sup>

The email correspondence between Agri-Mondo and Respondent was sent to Respondent at (b) (6), and the phone number provided under that email’s signature line was (b) (6), which is registered to “Ueno.”<sup>187</sup> Also provided on the email correspondence is Respondent’s official office phone and fax numbers.<sup>188</sup> Finally, Agri-Mondo provided a bounced check dated September 25, 2018, several months after the violation period (December 2017 through February 2018) related to Agri-Mondo in this case (for produce other than that listed in the Complaint in this case).<sup>189</sup> The check was written for the amount of \$8,000.00 on a “CKF Produce II Corp.”<sup>190</sup> JP Morgan Chase check (account ending in 7921), in purported payment of invoices 71012, 74050, and 75041 (all noted on the check),<sup>191</sup> and signed by Katherine De La Rosa, Respondent’s highest paid employee (as reported on the tax returns Respondent provided at hearing).<sup>192</sup> This check appears in evidence despite the fact that Koji

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<sup>185</sup> See Tr. I at 31-32.

<sup>186</sup> See CX13 at 33; CX1 at 4; Tr. I at 123.

<sup>187</sup> See CX34; Tr. II at 7-8. Respondent’s owner, Koji Ueno, testified that the number was “generated” for Respondent. Tr. II at 80.

<sup>188</sup> See CX34; Tr. II at 82-83.

<sup>189</sup> CX34 at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> RX3.

Ueno specifically testified that neither he, nor Respondent, *ever* made any payments to *any* of the twelve “unapproved” sellers.<sup>193</sup> Ms. De La Rosa also signed numerous CKF checks on the account ending in 3191 to several of the ten “approved” sellers.<sup>194</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Agri-Mondo in violation of PACA.

#### Produce Connection

Complainant acknowledges that Produce Connection is not currently owed any produce debt, and the amount listed in Appendix A to the Complaint has been paid.<sup>195</sup> On May 31, 2019, a representative of Produce Connection provided a document entitled “Sales Report, Outstanding and Paid Invoices,” which indicated that the \$37,674.00 invoice listed as owed in this case was adjusted to an amount of \$5,670.00 and paid by Respondent via wire transfer on March 8, 2018.<sup>196</sup> This payment was made thirty-four days after Respondent accepted the produce from Produce Connection, however, and was not made timely; the original invoice states ten-day payment terms.<sup>197</sup>

Several items of evidence regarding Produce Connection render Respondent’s claims that it has “never purchased produce” from Produce Connection, never “done business” with Produce Connection, and never even *heard* of Produce Connection incredible. A post-hearing investigation by Complainant has revealed that Respondent has not only done business with Produce Connection but also *paid* Respondent for the produce it allegedly never purchased

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<sup>193</sup> Tr. II at 103.

<sup>194</sup> See RX1; Tr I. at 229.

<sup>195</sup> See Complainant’s Brief at 30-31; CX4 at 3; CX13 at 34; CX41.

<sup>196</sup> CX41 at 6-10.

<sup>197</sup> CX13 at 34.

(albeit late under the Act).<sup>198</sup> This discredits Respondent's defense as to Produce Connection. Moreover, Respondent also paid Produce Connection for produce other than what is listed in the Complaint.<sup>199</sup>

On May 8, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6), accounts manager of Spring Valley Produce, Inc., d/b/a Produce Connection, and with (b) (6), salesperson of Produce Connection, d/b/a Spring Valley Produce.<sup>200</sup> Both (b) (6) and (b) (6) stated that when doing business with Respondent they dealt with Elpidio Ueno, whom they also knew as "Chino."<sup>201</sup> Both Ms. (b) (6) and (b) (6) discussed the debt listed as owed in the Complaint with Elpidio via telephone, and Elpidio said Respondent would pay the invoice.<sup>202</sup>

On May 31, 2019, (b) (6) provided Mr. Seo a document entitled "Sales Report, Outstanding and Paid Invoices," which indicates that the invoice listed as owed in the Complaint was adjusted to \$5,670.00 (from the original invoice #CC0050 in the amount of \$37,674.00) and paid by Respondent via wire transfer on March 8, 2018.<sup>203</sup> Also on May 31, 2019, Ms. Hedden provided copies of two checks presented for payment of produce by Respondent for produce not listed in the Complaint in this case:

- (1) Check dated November 17, 2017 (approximately three months after the violation period for Produce Connection as listed in the Complaint, which was February 4, 2018, invoice

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<sup>198</sup> See CX23 ¶ 25; CX41.

<sup>199</sup> See CX23 ¶ 25; CX41.

<sup>200</sup> CX23 ¶ 25.

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> See CX41.

# C00050), signed by Koji Ueno, Respondent's owner,<sup>204</sup> on a CKF Produce Corp. "JP Morgan Chase" account ending in 3191. This check was for invoice number C00017 (noted on the check) in the amount of \$19,345.24;<sup>205</sup> and

(2) Check dated November 20, 2017, signed by Katherine De La Rosa, Respondent's highest paid employee,<sup>206</sup> on a "CKF Produce II Corp." "JP Morgan Chase" account ending in 7921. This check was for invoice number C00020 (noted on the check) in the amount of \$12,230.00.<sup>207</sup>

These checks appear in evidence despite the fact that Koji Ueno specifically testified that neither he nor Respondent ever made any payments to any of the twelve "unapproved" produce sellers.

In addition, there are numerous – at least fifty-two – inspections in evidence that were ordered and paid for by Respondent regarding produce purchased from Produce Connection, beginning on January 13, 2017 and ending on August 1, 2018<sup>208</sup> (this despite the fact that Koji Ueno, Respondent's owner, claimed that Respondent never called for or ordered inspections).<sup>209</sup> These include an inspection request and inspection for the unpaid invoice in this case.<sup>210</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Produce Connection in violation of PACA.

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<sup>204</sup> CX1; Tr. II at 10-12.

<sup>205</sup> CX41 at 12.

<sup>206</sup> RX3.

<sup>207</sup> CX23 ¶ 25.

<sup>208</sup> CX40 at 181, 185; CX44 at 1-3. Respondent has stipulated (1) to the introduction of CX44 into evidence and (2) that the inspection requests are but a sample and that there is a similar corresponding inspection request for every inspection in CX40. Complainant's Post-Hearing Brief at 32 n.7.

<sup>209</sup> Tr. II at 98-100.

<sup>210</sup> CX13 at 34; CX40 at 184; CX44 at 2.

Leonard's Express

Complainant asserts that Respondent failed to pay Leonard's Express the entire produce debt of \$22,338.00 listed in Appendix A to the Complaint.<sup>211</sup> The evidence shows that Respondent failed to pay for produce purchased on February 20, 2018,<sup>212</sup> and as of at least April 29, 2019, the entire debt remained unpaid by Respondent.<sup>213</sup>

On April 29, 2019, Marketing Specialist Cathy Hance conducted a telephone interview with (b) (6) manager of Leonard's Express. (b) (6) stated that no portion of the debt owed to Leonard's Express had been paid as of the time of the interview. (b) (6) also stated that when doing business with Respondent, he dealt with "Ryan" and Elpidio Ueno, whom Mr. (b) (6) knew as "Chino." He stated that he had spoken with Elpidio and Ryan on two different phone numbers: (b) (6) and (b) (6). (b) (6) stated that, after a point, attempts to call both Elpidio and Ryan were to no avail; they were not answering his calls.<sup>214</sup>

Furthermore, Respondent's claim that it has "never purchased produce" from Leonard's Express, "never done business" with Leonard's Express, and never even *heard* of Leonard's Express is not credible. After being specifically asked for unpaid invoices, Respondent provided from its own records the Leonard's Express invoice to Marketing Specialist Steve Seo.<sup>215</sup> These invoices show initials or markings that also appear on paperwork from one of Respondent's "approved" sellers.<sup>216</sup> The record also contains emails between Respondent and Leonard's

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<sup>211</sup> Complaint; CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6; Tr. I at 51-55.

<sup>212</sup> Complaint; CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6; Tr. I at 51-55. *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>213</sup> CX13 at 35; CX24.

<sup>214</sup> CX24.

<sup>215</sup> CX4 at 3; Tr. I at 35, 106.

<sup>216</sup> *See* CX16 at 5 (Leonard Express paperwork) and CX13 at 29 (Gaetan Bono paperwork).

Express that are purportedly signed electronically by Respondent's owner, Koji Ueno. The company communicated with Respondent at the email address listed on Respondent's license application.<sup>217</sup> Moreover, there are four inspections in the record that were ordered on February 28, 2018 for the produce on the unpaid invoice at issue in this case, which were paid for by Respondent (despite the fact that Koji Ueno, Respondent's owner, claimed that Respondent never called for or ordered inspections)<sup>218, 219</sup>

Finally, (b) (6) stated in his telephone interview that he had spoken with both "Chino" and "Ryan," both of whom held themselves out to be representatives of Respondent. (b) (6) stated that he spoke with the men at two phone numbers: (1) (b) (6) which is registered to "Ueno",<sup>220</sup> and (2) 347-587-6400, which is Respondent's official office phone number.<sup>221</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Leonard's Express in violation of PACA.

#### Ryeco, LLC

Complainant asserts that Respondent failed to pay Ryeco, LLC ("Ryeco") the entire produce debt of \$1,284.00 listed in Appendix A to the Complaint. The record shows that Respondent failed to pay this seller for produce purchased on February 28, 2018, and as of at

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<sup>217</sup> Tr. I at 52-55, 94-96; CX16 at 6-8.

<sup>218</sup> Tr. II at 98-100.

<sup>219</sup> CX13 at 35; CX40 at 155-58; CX44 at 4.

<sup>220</sup> Koji Ueno, Respondent's owner, testified that the number was "generated for Respondent." Tr. II at 80.

<sup>221</sup> *Id.* at 82-83.

least July 31, 2019, the entire produce debt remained unpaid by Respondent.<sup>222</sup>

Further, Respondent's claim that it has "never purchased produce" from Ryeco, never "done business" with Ryeco, and never even *heard* of Ryeco is not credible. After being specifically asked for unpaid invoices, Respondent provided Marketing Specialist Steve Seo the Ryeco invoice from its own records at the time of the on-site investigation.<sup>223</sup> The invoice itself states that the produce was shipped to Respondent's address at 29-31 Brooklyn Terminal.<sup>224</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Ryeco, LLC in violation of PACA.

B&M Avocados, LLC

Complainant contends that Respondent failed to pay B&M Avocados, LLC ("B&M Avocados") \$23,115.00 of the original \$39,715.00 in produce listed on Appendix A to the Complaint.<sup>225</sup> The record reflects that Respondent failed to pay this seller \$23,115.00 for produce purchased on March 2, 2018 and that Respondent failed to pay *promptly* \$15,000.00 for produce purchased on March 2, 2018.<sup>226</sup>

On May 10, 2019 and May 14, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6), office manager and salesperson of B&M Avocados.<sup>227</sup> (b) (6) provided a "customer quick report" showing a \$15,000.00

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<sup>222</sup> Marketing Specialist Steve Seo conducted a telephone interview with (b) (6), Vice President of Ryeco, on July 31, 2019. (b) (6) stated that, as of the date of the interview, Respondent still owed Ryeco the entire produce debt of \$1,284.00. *See* Complainant's Brief, Attachment 1.

<sup>223</sup> CX4 at 3; Tr. I at 35, 106.

<sup>224</sup> CX1; CX13 at 31-33.

<sup>225</sup> Complainant's Post-Hearing Brief at 35.

<sup>226</sup> *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; CX4 at 3; CX13 at 36; CX22 ¶ 6.

<sup>227</sup> CX 23 ¶ 23.

payment made by Respondent on July 3, 2018.<sup>228</sup> The payment terms for this debt were “net 28 days,” and this partial payment was made late.<sup>229</sup> (b) (6) stated that, at the time of the telephone interview, Respondent owed B&M Avocados \$23,115.00 of the unpaid and past-due produce debt listed as owed in the Complaint.<sup>230</sup>

Further, several items of evidence in the record call directly contradict Respondent’s claims that it has “never purchased produce” from B&M Avocados, never “done business” with B&M Avocados, and never even *heard* of B&M Avocados. First, at the time of the on-site investigation of Respondent, Elpidio “Chino” Ueno – who held himself out to be a representative of Respondent and provided all requested information during the investigation – admitted that the debt for the produce at issue in this case was owed by Respondent.<sup>231</sup> Second, the B&M Avocados invoice itself reflects that the produce was shipped to Respondent at 29-31 Brooklyn Terminal (Respondent’s license address).<sup>232</sup> Complainant produced evidence of an inspection for the produce on this invoice on March 6, 2018, which was paid for by Respondent<sup>233</sup> despite the fact that Koji Ueno, Respondent’s owner, claimed Respondent never called for or ordered inspections.<sup>234</sup> Third, the record reflects that on July 3, 2018, a \$15,000.00 payment was made to B&M Avocados for a portion of the invoice and produce amount owed to B&M Avocados.<sup>235</sup> This payment appears in evidence despite the fact that Koji Ueno specifically testified that

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<sup>228</sup> See CX39.

<sup>229</sup> CX13 at 37.

<sup>230</sup> CX23 ¶ 23.

<sup>231</sup> Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

<sup>232</sup> CX1; CX13 at 31-33.

<sup>233</sup> CX13 ta 36; CX40 at 147-48; CX44 at 6.

<sup>234</sup> Tr. II at 98-100.

<sup>235</sup> CX13 at 31-33.

neither he, nor Respondent, *ever* made any payments to *any* of the twelve “unapproved” sellers.<sup>236</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to B&M Avocados in violation of PACA.

#### Trufresh

Complainant asserts that Respondent failed to pay Trufresh \$54,824.76 of the original \$91,764.75 in produce debt listed in Appendix A to the Complaint.<sup>237</sup> The record shows that Respondent failed to pay this seller \$54,824.76 for produce purchased between March 17, 2018 and April 10, 2018.<sup>238</sup> Respondent appears to have made two payments for the original \$91,764.75 timely<sup>239</sup> and made a third payment late, past the thirty-day “PACA terms” listed on the Trufresh invoices in this case.<sup>240</sup>

On April 4, 2019 and June 10, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6) accountant of Trufresh.<sup>241</sup> (b) (6) stated that partial payments for the \$91,764.75 in produce debt originally owed by Respondent were made and, on July 12, 2019, provided evidence of “wire credit payments.”<sup>242</sup> During each of the telephone interviews, (b) (6) stated that over \$54,000.00 was still

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<sup>236</sup> Tr. II at 103.

<sup>237</sup> Complainant’s Brief at 37.

<sup>238</sup> See *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49; CX4 at 3; CX22 ¶ 6; CX13 at 38-61; CX15; Tr. I at 37-42, 47-51.

<sup>239</sup> See Complainant’s Brief, Attachment 2.

<sup>240</sup> CX13 at 38-63; see Complainant’s Brief, Attachment 2.

<sup>241</sup> CX22 ¶ 6; CX23 ¶ 27.

<sup>242</sup> See CX22 ¶ 6(f); CX23 ¶ 27.

owed<sup>243</sup> and, as of July 12, 2019, \$54,824.76 was still unpaid by Respondent.<sup>244</sup> On June 4, 2019, a default reparation order in the amount of \$54,824.76 was issued against Respondent for this produce;<sup>245</sup> the order was not appealed and is therefore a final order of the Secretary of Agriculture.<sup>246</sup>

Further, several items of evidence in the record render incredible Respondent's claims that it has "never purchased produce" from Trufresh, never "done business" with Trufresh, and never even *heard* of Trufresh. First, the Trufresh invoices were provided to Mr. Seo by Respondent from its own records at the time of the on-site investigation, after Respondent was specifically asked for unpaid invoices.<sup>247</sup> There are approximately sixteen inspections in evidence, several of which were ordered for the produce on the invoices at issue in this case; every inspection was paid for by Respondent<sup>248</sup> – despite that Koji Ueno, Respondent's owner, claimed that Respondent never called for or ordered inspections.<sup>249</sup>

Second, there were two apparently timely, partial payments made by Respondent toward the total \$91,764.75 in produce debt listed in the Complaint: one on March 28, 2018 in the amount of \$14,452.70; the other on April 10, 2018 in the amount of \$7,607.89.<sup>250</sup> A third payment was made on June 22, 2018 in the amount of \$26,389.50.<sup>251</sup> It is not clear from the

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<sup>243</sup> CX22 ¶ 6; CX23 ¶ 27.

<sup>244</sup> Complainant's Brief, Attachment 3.

<sup>245</sup> *Id.*, Attachment 2.

<sup>246</sup> 7 U.S.C. § 499g.

<sup>247</sup> CX4 at 3; Tr. I at 35, 106.

<sup>248</sup> CX13 at 48, 55, 59; CX40; CX44 at 8.

<sup>249</sup> Tr. II at 98-100.

<sup>250</sup> CX22 ¶ 6(f).

<sup>251</sup> Complainant's Brief, Attachment 2.

evidence the exact invoices that these three payments (or what portion of them) went to; however, according to (b) (6) \$36,939.99 of the three payments did go to the total \$91,764.75 of produce debt owed to Trufresh.<sup>252</sup> These payments appear in evidence despite Koji Ueno's testimony that neither he nor Respondent ever made any payments to any of the twelve "unapproved" sellers.<sup>253</sup>

Third, emails provided to Mr. Seo by (b) (6) indicate that Trufresh's contacts were both "Chino" and "Ryan."<sup>254</sup> There were two phone numbers listed in the emails: (1) (b) (6) (b) (6) which is registered to "Ueno",<sup>255</sup> and (2) 347-587-6400, which is Respondent's official office phone number.<sup>256</sup>

Fourth, the Trufresh invoices and paperwork also contain two different "Tomato Suspension Agreement Accountings" (which must be provided with import of Mexican Tomatoes)<sup>257</sup> purportedly signed by Koji Ueno.<sup>258</sup>

Finally, several items found on the Trufresh invoices also appear on some of the "approved" vendor invoices. There are initials or markings written on the Trufresh paperwork that are also found on Exclusive, Inc. paperwork, Gaetan Bono paperwork, and Northeast Banana

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<sup>252</sup> CX22 ¶ 6; CX23 ¶ 7; Complainant's Brief, Attachment 2; Complainant's Brief, Attachment 3.

<sup>253</sup> Tr. II at 103.

<sup>254</sup> CX15.

<sup>255</sup> Tr. II at 7-8. Koji Ueno, Respondent's owner, testified that the number was "generated" for Respondent. Tr. II at 80.

<sup>256</sup> CX1; Tr. II at 82-83.

<sup>257</sup> Tomatoes imported from Mexico are subject to the terms of a 2013 Tomato Suspension Agreement ("TSA") pursuant to section 734(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1673(c)) and section 351.208 of the U.S. Department of Commerce Regulations (19 C.F.R. § 351.701).

<sup>258</sup> CX13 at 51-52, 60-61.

paperwork.<sup>259</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Trufresh in violation of PACA.

Ag Grower Sales, LLC

Complainant asserts that Respondent failed to pay Ag Grower Sales, LLC (“Ag Grower”) \$10,231.48 of the original \$88,704.00 in produce debt listed in Appendix A to the Complaint.<sup>260</sup> The evidence shows that, at some point, the invoice for \$88,704.00 (#1736) was revised and adjusted by Ag Grower down to \$30,694.48, and Respondent made partial payments (albeit several months after the ten-day payment terms listed on the invoice), leaving an unpaid balance of \$10,231.48.<sup>261</sup> As of at least April 30, 2019, this balance owed to Ag Grower remained unpaid by Respondent;<sup>262</sup> therefore, Respondent failed to pay this seller for produce purchased on June 18, 2018 (and also failed to pay promptly on the partial amounts paid).<sup>263</sup>

On April 30, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6), Managing Member of Ag Grower. (b) (6) stated that when doing business with Respondent, he dealt with “Ryan” or “Chino.”<sup>264</sup> (b) (6) stated that he called and spoke with Ryan and Chino at the following phone numbers: (b) (6)

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<sup>259</sup> See CX13 at 47 and 49 (Trufresh paperwork) and CX13 at 6 (Exclusive, Inc. paperwork), CX13 at 27 (Gaetan Bono paperwork); CX13 at 58 (Trufresh paperwork) and CX13 at 3 (Exclusive, Inc. paperwork), CX13 at 118, 125 (Northeast Banana paperwork). See also Tr. II at 138-42.

<sup>260</sup> Complainant’s Post-Hearing Brief at 39.

<sup>261</sup> CX33 at 8-11. This adjustment was not known to Respondent until after a post-hearing investigation was conducted.

<sup>262</sup> CX23 ¶ 16; CX33.

<sup>263</sup> See *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>264</sup> CX23 ¶ 16.

and 347-836-1890.<sup>265</sup> Both of these numbers were shown to be associated with Respondent.<sup>266</sup>

Although [REDACTED] testified that the entirety of the produce debt to Ag Grower (\$88,704.00) remained unpaid and past due as of April 30, 2019, the documentary evidence shows the outstanding amount to be \$10,231.00.<sup>267</sup> On June 5, 2019, a default reparation order for the debt described above, along with other produce Respondent purchased from Ag Grower,<sup>268</sup> in the total amount of \$79,755.28.<sup>269</sup> This order was not appealed and is therefore a final order of the Secretary.<sup>270</sup> As of the time Complainant filed its posthearing Brief, the default reparation order had not been paid.<sup>271</sup> The additional reparation debt owed is roll-over debt that contributes to Respondent's failure-to-pay violation under PACA section 2(4).<sup>272</sup>

Further, the evidence suggests that Respondent's claim that it "has never purchased produce" from Ag Grower, never "done business" with Ag Grower, and never even *heard* of Ag Grower is false.

First, during the April 30, 2019 investigation of Respondent, (b) (6) [REDACTED] provided instant message communications between Ag Grower and an instant-message address of "Ryan@CKF" regarding sales of produce and debt owed by Respondent.<sup>273</sup> (b) (6) [REDACTED] also provided three checks written from Respondent to Ag Grower, which were made out and signed during the

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<sup>265</sup> *Id.*

<sup>266</sup> *See* CX1; CX23 ¶ 28; CX43; Tr. II at 82-83.

<sup>267</sup> *See* CX23 ¶ 16; CX33.

<sup>268</sup> On June 28, 2018 for \$69,523.80. Complainant's Brief, Attachment 4.

<sup>269</sup> *See id.*

<sup>270</sup> 7 U.S.C. § 499g; *see* Complainant's Brief, Attachment 4.

<sup>271</sup> *See* Complainant's Brief at 12.

<sup>272</sup> *See Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>273</sup> *See* CX33.

violation period. Two of these checks were in partial payment for the debt listed in the Complaint, and one was for additional debt incurred prior to the debt at issue.<sup>274</sup> They are written on a “CKF Produce Corp.” check (JP Morgan Chase check/account ending in 3191) signed by Koji Ueno and on “CKF Produce II Corp.” checks (JP Morgan Chase check/account ending in 7921) signed by Katherine De La Rosa,<sup>275</sup> Respondent’s highest paid employee.<sup>276</sup> These checks appear in evidence despite that Koji Ueno specifically testified that neither he, nor Respondent, ever made any payments to any of the twelve “unapproved” sellers.<sup>277</sup>

Second, Respondent provided Mr. Seo with the Ag Grower invoices from its own records at the time of the on-site investigation, after Respondent was specifically asked for unpaid invoices.<sup>278</sup> The invoices themselves state that produce was shipped to Respondent at 29-31 Brooklyn Terminal, Respondent’s license address.<sup>279</sup>

Third, there are initials or markings written on Ag Grower’s paperwork that are also found on paperwork from Exclusive Produce, Inc., and Gaetan Bono—two of Respondent’s “approved” sellers.<sup>280</sup>

Fourth, (b) (6) (Manager of Ag Grower) specifically stated that he spoke with Elpidio “Chino” Ueno and “Ryan” on the numbers (b) (6) (associated with Katherine De

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<sup>274</sup> See CX23 ¶ 16.

<sup>275</sup> See Complainant’s Brief at 41-42; Complainant’s Reply Brief at 18; CX23 ¶ 16; CX33 at 8-11.

<sup>276</sup> See RX3.

<sup>277</sup> Tr. II at 103.

<sup>278</sup> CX4 at 3; Tr. I at 35, 106.

<sup>279</sup> CX 1; CX13 at 64.

<sup>280</sup> See Attachment 4 at 7 (Ag Grower paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork).

La Rosa and Elpidio Ueno)<sup>281</sup> and 347-587-6400 (CKF Produce's official office phone number).<sup>282</sup> Similarly, notes from (b) (6) (Sales Assistant of Ag Grower) indicate that she called Respondent on the same numbers.<sup>283</sup>

Finally, Complainant produced evidence of two inspections that were ordered and paid for by Respondent; one such inspection is for the produce on the invoice at issue in this case,<sup>284</sup> notwithstanding that Koji Ueno, Respondent's owner, claimed Respondent never called for or ordered inspections.<sup>285</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Ag Grower Sales, LLC in violation of PACA.

Paulmex International, Ltd.

Complainant contends that Respondent failed to pay Paulmex International, Ltd. ("Paulmex") the entire produce debt of \$41,041.00 listed in Appendix A to the Complaint.<sup>286</sup> The evidence shows that Respondent failed to pay this seller for produce purchased between June 8, 2018 and July 24, 2018.<sup>287</sup> On March 19, 2019, a default reparation order for this produce in the amount of \$41,041.00 was issued against Respondent,<sup>288</sup> this order was not appealed and is therefore a final order of the Secretary of Agriculture.<sup>289</sup> I find that as of at least May 9, 2019,

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<sup>281</sup> CX23 ¶ 28; CX43.

<sup>282</sup> CX1; Tr. II at 82-83.

<sup>283</sup> See CX33 at 4-7.

<sup>284</sup> CX13 at 64; CX40 at 24-28; CX44 at 5.

<sup>285</sup> Tr. II at 98-100.

<sup>286</sup> See Complainant's Brief at 44; CX33 at 8-11.

<sup>287</sup> See CX4 at 3; CX13 at 65-73; *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>288</sup> CX19 at 66-69.

<sup>289</sup> 7 U.S.C. § 499g.

the entire produce debt of \$41,041.00 owed to Paulmex remained unpaid by Respondent.<sup>290</sup> And the default reparation had not been paid as of the date Complainant filed its posthearing Brief.<sup>291</sup>

Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6), owner of Paulmex, on May 9, 2019. (b) (6) stated that when doing business with Respondent, he dealt with “Ryan” and Elpidio Ueno – whom he also knew as Chino – and that he spoke with them at the phone number (b) (6).<sup>292</sup> Mr. (b) (6) provided copies of the unpaid produce invoices owed by Respondent, as well as copies of emails between Paulmex and Respondent regarding the debt listed as owed in the Complaint.<sup>293</sup> (b) (6) stated that at the time of the telephone interview, the entire debt to Paulmex, as listed in the Complaint, was still owed.<sup>294</sup>

Further, Complainant has submitted evidence to render Respondent’s claim that it “never purchased produce” from Paulmex, had never “done business” with Paulmex, and never even *heard* of Paulmex incredible. First, during the on-site investigation of Respondent, Elpidio “Chino” Ueno—who held himself out to be the representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed \$41,041.00 in produce debt to Paulmex.<sup>295</sup> Second, the email correspondence between Paulmex and Respondent that (b) (6) provided was sent to Respondent at the email (b) (6); the phone number provided under (b) (6) is (b) (6).

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<sup>290</sup> CX19; CX23 ¶ 21; CX37.

<sup>291</sup> CX19.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*; CX27.

<sup>294</sup> CX23 ¶ 21.

<sup>295</sup> *See* Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

(b) (6) which is registered to “Ueno.”<sup>296</sup> Also on the email correspondence is Respondent’s office phone and fax number.<sup>297</sup> Third, there are initials or markings found on Paulmex’s invoices that also appear on several of the “approved” sellers’ invoices.<sup>298</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Paulmex in violation of PACA.

#### OTC Produce, LLC

Complainant asserts that Respondent failed to pay OTC Produce, LLC (“OTC Produce”) the entire produce debt of \$74,000.00 listed in Appendix A to the Complaint.<sup>299</sup> The record establishes that Respondent failed to pay this seller for produce purchased between July 6, 2018 and July 13, 2018.<sup>300</sup> As of at least May 9, 2019, the entire produce debt of \$74,000.00 to OTC Produce remained unpaid by Respondent.<sup>301</sup>

On May 9, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6) owner of OTC Produce.<sup>302</sup> (b) (6) stated that when doing business with Respondent, he dealt with “Chino” and spoke with him at the phone number (b) (6).<sup>303</sup> (b) (6) provided copies of the unpaid produce invoices owed

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<sup>296</sup> CX15. Koji Ueno, Respondent’s owner, testified that the number was “generated” for Respondent. Tr. II at 80.

<sup>297</sup> See CX15; Tr. II at 82-83.

<sup>298</sup> See CX13 at 68, 17 (Paulmex paperwork); CX19 at 24 (Paulmex paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork). In addition, the words “100-13 Foster Ave” – which is the address for CKF Produce II Corp. – appears on the Paulmex paperwork. See CX13 at 71; CX19 at 24; CX43 at 8-10.

<sup>299</sup> Complainant’s Brief at 45.

<sup>300</sup> See CX4 at 3; CX36; Tr. I at 187; *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>301</sup> CX23 ¶ 20; CX36.

<sup>302</sup> CX23 ¶ 20.

<sup>303</sup> *Id.*

by Respondent, as well as copies of wire transfers made from a “CKF II” account to OTC during the violation period for produce other than what is listed in the Complaint.<sup>304</sup> (b) (6) stated that at the time of the telephone interview, the entire \$74,000.00 in debt to OTC was still owed.<sup>305</sup>

Further, Complainant submitted several items of evidence that contradict Respondent’s claim that it has “never purchased produce” from OTC Produce, never “done business” with OTC Produce, and never even *heard* of OTC Produce. First, at the time of Respondent’s on-site investigation, Elpidio “Chino” Ueno (brother of Koji Ueno, Respondent’s 100-percent owner—who held himself out to be the representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed the \$74,000.00 produce debt to OTC Produce.<sup>306</sup> Second, (b) (6) stated that when doing business with Respondent he dealt with “Chino” and spoke with him at the phone number (b) (6)<sup>307</sup> Mr. Seo used certain software to trace this number and discovered that it is associated with Katherine De La Rosa (Respondent’s highest paid employee) and Elpidio “Chino” Ueno.<sup>308</sup> Third, there is evidence of five inspections that were ordered for and paid by Respondent for the produce on the invoice at issue.<sup>309</sup> This is despite the fact that Koji Ueno, Respondent’s owner, claimed Respondent never called for or ordered inspections.<sup>310</sup> Finally, the evidence shows that

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<sup>304</sup> See CX36 at 22-23 (leaving a balance of \$74,000.00).

<sup>305</sup> CX23 ¶ 20.

<sup>306</sup> Tr. I at 78-79, 88, 98, 174, 178-79, 186-87; see CX4 at 3.

<sup>307</sup> CX23 ¶ 20.

<sup>308</sup> CX23 ¶ 28; CX43; Tr. II at 13.

<sup>309</sup> CX13 ¶ 64; CX36 at 7-9, 11; CX40 at 16-19, 42; CX44 at 5.

<sup>310</sup> Tr. II at 98-100.

Respondent made several payments to OTC Produce on a CKF II Corp. JP Morgan Chase account ending in 7921.<sup>311</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to OTC Produce in violation of PACA.

#### Roland Marketing

Complainant asserts that Respondent failed to pay Roland Marketing the entire produce debt of \$7,523.50 listed in Appendix A to the Complaint.<sup>312</sup> The evidence shows that Respondent failed to pay this seller for produce purchased on July 30, 2018.<sup>313</sup> As of at least July 15, 2019, the entire produce debt of \$7,523.50 owed to Roland Marketing remained unpaid by Respondent.<sup>314</sup>

On May 8, 2019 and May 10, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6) President and Chief Operating Officer of Roland Marketing.<sup>315</sup> On July 15, 2019, (b) (6) confirmed that as of that date Respondent had failed to pay the entire \$7,523.50 in produce debt owed to Roland Marketing.<sup>316</sup>

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<sup>311</sup> See CX36 at 20 (May 25, 2018 check of \$10,4000.00 for produce not at issue in this case); CX36 at 19 (June 12, 2018 check of \$22,000.00 for produce not at issue in this case); CX36 at 18 (June 21, 2018 check of \$21,960.00 for produce not at issue in this case); CX36 at 17 (July 3, 2018 check of \$15,000.00 for produce not at issue in this case); CX36 at 16 (July 11, 2018 check for \$22,000.00 for produce not at issue in this case); CX36 at 16 (July 19, 2018 check of \$15,000.00 for produce not at issue in this case); CX36 at 15 (July 26, 2018 check of \$15,000.00 for produce not at issue in this case); CX36 at 14 (July 26, 2018 check of \$15,000.00 for produce not at issue in this case); CX36 at 21 (September 27, 2018 check of \$18,000.00 for a portion of the produce at issue in this case, which was made late). This left a total due of \$74,000 for invoice numbers 39 and 40. CX36; see *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>312</sup> Complainant's Brief at 48.

<sup>313</sup> CX4 at 3; CX13 at 74; CX22 ¶ 6(g); CX38.

<sup>314</sup> See Complainant's Brief, Attachment 5.

<sup>315</sup> CX23 ¶ 22.

<sup>316</sup> *Id.*

Further, the evidence of record contradicts Respondent's claim that it has "never purchased produce from" Roland Marketing, never "done business" with Roland Marketing, and never even *heard* of Roland Marketing. First, Respondent provided Mr. Seo with the Roland Marketing invoices, from its own records, during the on-site investigation.<sup>317</sup> Second, Mr. (b) (6) provided a credit application he had received from Respondent when Roland Marketing began doing business with Respondent.<sup>318</sup> The application contains the following information: Respondent's name (listed as CKF Produce); Respondent's mailing address (29 Brooklyn Terminal Market); Respondent's phone and fax numbers, as listed on Respondent's license application;<sup>319</sup> Respondent's federal tax ID number;<sup>320</sup> Respondent's PACA license number;<sup>321</sup> Respondent's president and owner, listed as Koji Ueno with a phone number of (b) (6),<sup>322</sup> Respondent's "sales manager," listed as Elpidio Ueno with a phone number of 347-587-6400 (Respondent's official office phone number); "bank information" that indicates the applicant's bank is Chase Bank, with an account number ending in 7921 (CKF Produce II Corp.'s bank account);<sup>323</sup> and an application signature by Koji Ueno, Respondent's president, with a witness name of "Ryan" printed under Koji Ueno's name.<sup>324</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Roland Marketing in violation of PACA.

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<sup>317</sup> CX4 at 3; Tr. I at 35, 106.

<sup>318</sup> CX38.

<sup>319</sup> See CX1.

<sup>320</sup> See RX3.

<sup>321</sup> See CX1.

<sup>322</sup> This phone number is registered to Koji Ueno. See CX23 ¶ 28; CX43.

<sup>323</sup> See *supra* regarding several of the payments made to the twelve "non-approved" vendors.

<sup>324</sup> CX38 at 5-8.

Higueral Produce, Inc.

Complainant contends that Respondent failed to pay Higueral Produce, Inc. (“Higueral Produce”) the entire produce debt of \$109,898.07 listed in Appendix A to the Complaint.<sup>325</sup> The record indicates that Respondent failed to pay this seller for produce purchased between July 31, 2018 and September 1, 2018.<sup>326</sup> As of at least May 6, 2019, the entire produce debt of \$109,898.07 owed to Higueral Produce remained unpaid by Respondent.<sup>327</sup>

On May 6, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6), an employee in the accounts receivable section of Higueral Produce.<sup>328</sup> (b) (6) stated that when doing business with Respondent, she dealt with “Ryan” or Chino” and that she spoke with both of them about the produce debt owed to Higueral Produce at the following phone numbers: (b) (6) and (b) (6) (b) (6) (registered to Eran Evanim).<sup>329</sup> (b) (6) stated that at the time of the telephone interview, the entire debt to Higueral Produce listed in Appendix A to the Complaint was still owed.<sup>330</sup>

Also on May 6, 2019, Mr. Seo conducted a telephone interview with (b) (6), a produce salesperson for Higueral Produce.<sup>331</sup> (b) (6) stated that Chino “put him in touch with Ryan” for loads arriving outside the CKF Brooklyn Terminal Market warehouse (when that

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<sup>325</sup> Complainant’s Brief at 49.

<sup>326</sup> CX4 at 3; CX13 at 79-95; CX35; *see Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>327</sup> CX23 ¶ 18.

<sup>328</sup> *Id.*

<sup>329</sup> *See* CX23 ¶ 28; CX43.

<sup>330</sup> CX23 ¶ 19.

<sup>331</sup> *Id.*

warehouse was full) so that Higueral Produce could ship “outside the market where Ryan is.”<sup>332</sup>

(b) (6) also stated that Chino told him that “Ryan works for him” (Chino).<sup>333</sup> (b) (6)

stated that when he did business with Respondent, he spoke with both Ryan and Chino at the

phone numbers (b) (6) and also with Ryan at the phone number (b) (6)

(b) (6)<sup>334</sup>

Further, several items of evidence render Respondent’s claim that it has “never purchased produce” from Higueral Produce, never “done business” with Higueral Produce, and never even *heard* of Higueral Produce incredible. First, during Respondent’s on-site investigation, Elpidio “Chino” Ueno (brother of Koji Ueno, Respondent’s 100-percent owner) – who held himself out to be the representative of Respondent and provided all requested information during the investigation – admitted that the \$109,898.07 in produce debt to Higueral Produce was owed by Respondent.<sup>335</sup> Second, (b) (6) and (b) (6) specifically spoke with both Elpidio “Chino” Ueno and “Ryan” on three different phone numbers about ordering produce and about the debt owed by Respondent for that produce: one number, 347-587-6400, is Respondent’s official office phone number;<sup>336</sup> another number, (b) (6) is associated with Katherine De La Rosa, Respondent’s highest employee;<sup>337</sup> and the third number, (b) (6) is associated with Eran “Ryan” Evanaim.<sup>338</sup> Finally, several initials or markings that appear on the Higueral

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<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

<sup>336</sup> CX1; Tr. II at 82-83.

<sup>337</sup> *See* RX3.

<sup>338</sup> CX23 ¶ 28; CX43.

Produce paperwork are also found on paperwork from a few of Respondent's "approved" sellers.<sup>339</sup>

Accordingly, I find that the preponderance of the evidence demonstrates Respondent failed to make full payment promptly to Higueral Produce in violation of PACA.

Ergo Produce, Inc.

Complainant asserts that Respondent failed to pay Ergo Produce, Inc. ("Ergo Produce") \$4,999.99 of the original \$16,163.99 in produce debt listed in Appendix A to the Complaint.<sup>340</sup> The record shows that Respondent failed to pay this seller for produce purchased on August 9, 2018.<sup>341</sup> On March 27, 2019, a default reparation order for this produce was issued against Respondent in the amount of \$4,999.99; this order was not appealed and is therefore a final order of the Secretary of Agriculture.<sup>342</sup> As of at least June 11, 2019, \$4,999.99 of the original \$16,163.99 in produce debt owed to Ergo Produce remained unpaid by Respondent.<sup>343</sup> And as of the date of Complainant's posthearing Brief, the default reparation order had not been paid.<sup>344</sup>

On May 3, 2019 and June 11, 2019, Marketing Specialist Steve Seo conducted a telephone interview and exchanged emails with (b) (6) a salesperson with Ergo Produce.

(b) (6) stated that when doing business with Respondent, she dealt with "Ryan" and

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<sup>339</sup> See CX13 at 81, 83 (Higueral Produce paperwork), CX13 at 6 (Exclusive Produce, Inc. paperwork), and CX13 at 27 (Gaetan Bono paperwork); CX 13 at 91 (Higueral Produce paperwork) and CX13 at 29 (Gaetan Bono paperwork).

<sup>340</sup> Complainant's Brief at 51.

<sup>341</sup> See CX4 at 3; CX13 at 75-78; CX23 ¶ 26; CX42; see *Scamcorp, Inc.*, 57 Agric. Dec. at 547-49.

<sup>342</sup> 7 U.S.C. § 499g; CX21 at 4-43.

<sup>343</sup> CX23 ¶ 26; CX42.

<sup>344</sup> CX22 ¶ 5.

“Chino.”<sup>345</sup> (b) (6) also stated that Respondent had made two payments toward the \$16,163.99 produce debt owed: on September 25, 2018, “CKF Produce II Corp.” (on a JP Morgan Chase account) made a \$6,164.00 wire transfer to Ergo Produce; and on October 17, 2018, “CKF Produce II Corp.” made a \$5,000.00 wire transfer to Ergo Produce.<sup>346</sup> Both of these wire transfers were made in partial payment of the debt listed as owed in Appendix A to the Complaint—paid late, past the twenty-one-day payment terms<sup>347</sup>—leaving a balance of \$4,999.99.<sup>348</sup>

Further, Complainant produced evidence that renders Respondent’s claim that it has “never purchased produce” from Ergo Produce, never “done business” with Ergo Produce, and never even *heard* of Ergo Produce incredible. First, during the on-site investigation of Respondent, Elpidio “Chino” Ueno (brother of Koji Ueno, Respondent’s 100-percent owner)—who held himself out to be a representative of Respondent and provided all requested information during the investigation—admitted that Respondent owed the produce debt to Ergo Produce.<sup>349</sup> Second, Respondent made two payments toward the \$16,163.99 to Ergo Produce via wire transfer from a “CKF Produce II” JP Morgan Chase account.<sup>350</sup> Finally, there are initials or markings written on the Ergo Produce paperwork that also appear on paperwork from Respondent’s “approved” vendors.<sup>351</sup> Accordingly, I find that the preponderance of the evidence

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<sup>345</sup> CX23 ¶ 26.

<sup>346</sup> *Id.*

<sup>347</sup> *See* CX13 at 75-58.

<sup>348</sup> CX23 ¶ 26; CX42.

<sup>349</sup> Tr. I at 79, 88, 98, 174, 179, 186; CX4 at 3.

<sup>350</sup> CX23 ¶ 26 (made in the amounts of \$6,164.00 and \$5,000.00); *see* CX42.

<sup>351</sup> *See* CX13 at 77 (Ergo Produce paperwork); CX13 at 6 (Exclusive Produce, Inc. paperwork); CX13 at 27 (Gaetan Bono paperwork).

demonstrates Respondent failed to make full payment promptly to Ergo Produce in violation of PACA.

Complainant has met its burden of proving that Respondent's conduct constitutes willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b(4)).

As previously discussed, Respondent paid one of the ten "approved" sellers timely, paid three of the ten "approved" sellers late (between five to thirty days past the terms agreed to by the parties), and, as of well after the hearing in this case, failed to pay a total of \$238,282.25 to six of the ten "approved" sellers. Respondent paid *none* of the twelve "unapproved" sellers timely, paid one of the twelve "unapproved" sellers late (past the ten-day payment terms agree to by the parties),<sup>352</sup> and, as of well after the hearing in this case, failed to pay a total of \$358,072.05 to eleven of the twelve "unapproved" sellers. In sum, payment breakdown of the twelve "unapproved" sellers is as follows:

Agri-Mondo:	Owed \$8,816.25 as of May 3, 2019;
Produce Connection:	Paid in full, approximately twenty days late;
Leonard's Express:	Owed \$22,338.00 as of April 29, 2019;
Ryeco LLC:	Owed \$1,284.00 as of May 3, 2019;
B&M Avocados, LLC:	Late partial payment of \$15,000.00; still owed \$23,115.00 as of May 14, 2019;
Trufresh:	Partial payment of approximately \$40,000.00; still owed \$54,824.76 as of July 12, 2019;
Ag Grower Sales, LLC:	Late partial payment of approximately \$20,000.00; still owed \$10,231.48 as of April 30, 2019;
Paulmex International, Ltd:	Owed \$41,041.00 as of May 9, 2019;
OTC Produce, LLC:	Owed \$74,000.00 as of May 9, 2019;
Roland Marketing:	Owed \$7,523.50 as of July 15, 2019;
Higueral Produce, Inc.:	Owed \$109,898.07 as of May 6, 2019; and
Ergo Produce, Inc.:	Late partial payment of approximately \$11,000.00; still

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<sup>352</sup> CX13 at 34; CX41.

owed \$4,999.99 as of June 11, 2019.

Further, after the hearing, Respondent still owed a total of \$358,072.05 to eleven of the twelve “unapproved” sellers. There also exists additional past due and unpaid roll-over debt that is not part of the amounts originally listed in the Complaint in this case but nonetheless contributes to Respondent’s failure to pay violation under PACA section 2(4): \$7,641.50 owed to US Fresh; and \$69,523.80 owed to Ag Grower Sales, LLC. Therefore, Respondent is in violation of the payment provisions of PACA.

As more than *de minimis* amounts<sup>353</sup> are still owed well after hearing, this is a “no-pay” case; Respondent has violated PACA section 2(4).<sup>354</sup> In any “no-pay” case in which the violations are flagrant or repeated, the license of a PACA licensee shown to have violated the payment provisions of PACA will be revoked.<sup>355</sup> “Full compliance” with the payment provisions of PACA requires “not only that a respondent have paid all produce sellers in accordance with the PACA, but also that a respondent have no credit agreements with produce sellers for more than 30 days.”<sup>356</sup> In this case, not one of the twenty-two sellers had credit agreements beyond what was indicated on the invoices for produce.<sup>357</sup> Respondent’s violations of section 2(4) are willful, flagrant, and repeated.<sup>358</sup>

Participation and licensing in the perishable agricultural commodities industry is strictly

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<sup>353</sup> See *The Square Group, LLC*, 75 Agric. Dec. 689, 695 (U.S.D.A. 2016); *Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81, 82-83 (U.S.D.A. 1984) (Ruling on Certified Question).

<sup>354</sup> *Scamcorp, Inc.*, 57 Agric. Dec. 527, 547-49 (U.S.D.A. 1998); 7 U.S.C. § 499b(4).

<sup>355</sup> *Scamcorp, Inc.*, 57 Agric. Dec. at 549.

<sup>356</sup> *Id.*

<sup>357</sup> CX13; CX23; Tr. II at 113. Koji Ueno testified that payment terms for all of Respondent’s sellers were a maximum of two weeks to a month. Tr. II at 65.

<sup>358</sup> *D.W. Produce, Inc.*, 53 Agric. Dec. 1672, 1678 (U.S.D.A. 1994).

limited to financially responsible persons; this is one of the primary goals of PACA.<sup>359</sup> A harsh sanction policy has been consistently upheld by the courts.<sup>360</sup> Given the evidence regarding Respondent's failure to pay many of ten "approved" sellers and virtually all of the twelve "unapproved" sellers in this case, the only appropriate sanction is revocation of Respondent's PACA license, or publication in lieu of revocation under PACA section 8(a) (since Respondent does not currently hold a valid PACA license).<sup>361</sup>

Where failure to pay violations of PACA section 2(4) are committed, denial of a respondent's PACA license application under PACA section 4(d) is the appropriate sanction.<sup>362</sup> Cases regarding license denial do not specifically state a length of time for which a license application is to be denied – the cases simply state that it is so denied, based on Respondent's violations.<sup>363</sup> PACA section 4 dictates the length of time for a denial of a license or license application; here, the license must be refused under 7 U.S.C. § 499d(b) for at least a two-year

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<sup>359</sup> See *Coosemans Specialties, Inc. v. Dep't of Agric.*, 482 F.3d 560, 567 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 240 (3d Cir. 2007); *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 588 (6th Cir. 2003) ("PACA was 'designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility.'") (quoting *Kanowitz Fruit & Produce Co. v. U.S. Dep't of Agric.*, No. 97-4224, 1998 WL 863340, at \*1 (2d Cir. Oct. 29, 1998)); *The Caito Produce Co.*, 48 Agric. Dec. 602, 616-17 (U.S.D.A. 1989).

<sup>360</sup> See, e.g., *Kleiman & Hochberg, Inc. v. U.S. Dep't of Agric.*, 497 F.3d 681, 690-91 (D.C. Cir. 2007); *Baiardi Food Chain v. United States*, 482 F.3d 238, 241, 244 (3d Cir. 2007); *Hawkins v. Dep't of Agric.*, 10 F.3d 1125, 1133-35 (5th Cir. 1993).

<sup>361</sup> See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

<sup>362</sup> See *Andershock Fruitland*, 55 Agric. Dec. 1204, 1208 (U.S.D.A. 1996), *aff'd sub nom. Andershock's Fruitland, Inc. v. U.S. Dep't of Agric.*, 151 F.3d 735 (7th Cir. 1998).

<sup>363</sup> See *Andershock's Fruitland, Inc. v. U.S. Dep't of Agric.*, 151 F.3d 735, 738-39 (7th Cir. 1998); *Williamsport Purveyors, Inc. v. U.S. Dep't of Agric.*, 916 F.2d 82, 84-85 (3d Cir. 1990); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 992-93 (2d Cir. 1974), *cert. denied*, 419 U.S. 830 (1974).

period (with a possibility of posting a license bond upon application to the PACA Division) and a three-year period without bond under 7 U.S.C. § 499d(c).

Moreover, regarding sanction and length of license denial, Respondent has to date failed to pay four reparation awards involving the unpaid produce at issue in this case, totaling \$111,097.23. Respondent has failed to timely appeal these reparation awards, and they have therefore become final orders of the Secretary.<sup>364</sup> The sanction for these default reparations, apart from the sanction warranted and appropriate for the other failures to pay at issue in this case, is suspension of any PACA license (or refusal to issue a license, in the case of an application) until each default reparation award is paid in full.<sup>365</sup> Under PACA section 8, any persons responsibly connected to a default reparation award is under employment sanctions until that award is paid.<sup>366</sup> Here, Koji Ueno, as a 100-percent shareholder of Respondent, has been determined to be responsibly connected to Respondent when it failed to pay all four reparation awards.<sup>367</sup> Koji Ueno did not contest this determination.<sup>368</sup> Therefore, Koji Ueno is currently under both licensing and employment sanctions until all four default reparation awards are paid in full.<sup>369</sup> On that basis alone, pursuant to PACA section 4, Respondent's application for a PACA license must be denied and cannot be considered until the default reparation awards are paid in full.<sup>370</sup>

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<sup>364</sup> CX15-21, Complainant's Brief, Attachment 1; *see* 7 U.S.C. § 499g; *Shreiner v. Farmers Trust Co.*, 91 F.2d 606, 607 (3d Cir. 1937), *cert. denied*, 302 U.S. 686 (1937); *Am. Fruit Growers v. Lewis D. Goldstein Fruit & Produce Corp.*, 78 F. Supp. 309, 311 (E.D. Pa. 1948).

<sup>365</sup> 7 U.S.C. § 499d(b)(D); 7 U.S.C. § 499h.

<sup>366</sup> 7 U.S.C. § 499h(b).

<sup>367</sup> *See* CX19-21.

<sup>368</sup> *See id.*; *see also* Complainant's Brief, Attachments 2 and 4.

<sup>369</sup> 7 U.S.C. § 499h.

<sup>370</sup> *Id.*; 7 U.S.C. § 499d(b)(D).

### **Findings of Fact**

1. Respondent CKF Produce, Inc. is a New York corporation with a business address of 29-31 Brooklyn Terminal Market, Brooklyn, New York, 11236-1511. (CX1-CX3).
2. Pursuant to the licensing provisions and requirements of PACA, license number 2016-1004 was issued to Respondent on August 2, 2016. This license terminated on August 2, 2018, pursuant to PACA section 4(a) (7 U.S.C. § 499d(a)), when Respondent failed to pay the required annual renewal fee. Therefore, Respondent is not currently licensed under PACA but is subject to its licensing provisions and requirements. (CX1-CX3).
3. Subsequent to the termination of Respondent's PACA license, Respondent submitted a completed license application to Complainant on January 16, 2019. (CX1).
4. On February 13, 2019, Complainant filed a disciplinary Notice to Show Cause and Complaint ("Complaint") against Respondent alleging that Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) (7 U.S.C. § 499b(4)) and that, pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)), Respondent is unfit to be licensed under PACA and the refusal to issue a PACA license to Respondent is proper. (Complaint at 3).
5. Respondent failed to make full payment promptly to the seller Exclusive Produce, Inc. for produce purchased between March 7, 2017 and July 13, 2017, in the total amount of \$10,225.00. (CX4 at 3; CX5; CX13 at 1-6; Tr. I at 28-30, 33-35). To date, Respondent has failed to pay the entire produce debt of \$10,225.00 owed to Exclusive Produce, Inc. (*See* CX4 at 3; CX5; CX13 at 1-6; Tr. I at 29-30, 33-35).
6. Respondent failed to make full payment promptly to the seller Exp. Group LLC for produce purchased between May 29, 2017 and June 16, 2017, in the total amount of \$255,945.75. (CX4 at 3; CX5; CX13 at 7-24; CX 22 ¶ 6(a); Tr. I at 30). As of at least April 24, 2019,

- Respondent failed to pay \$191,226.25 of the original \$255,945.75 produce debt owed to Exp Group LLC. (CX13 at 11-24; CX 22 ¶ 6(a); CX23 ¶ 13; CX30; Tr. I at 30, 109-11).
7. Respondent failed to make full payment promptly to the seller Lawrence J. Lapide, Inc. for produce purchased on July 27, 2017, in the total amount of \$8,120.00. (CX4 at 3; CX5; CX13 at 25; CX23 ¶ 7; CX25; Tr. I at 30-31). As of at least April 23, 2019, Respondent failed to pay the entire produce debt of \$8,120.00 owed to Lawrence J. Lapide, Inc. (CX13 at 25; CX23 ¶ 7; CX25; Tr. I at 30-31).
  8. Respondent failed to make full payment promptly to the seller Gaetan Bono for produce purchased between November 23, 2017 and December 13, 2017, in the total amount of \$16,091.00. (CX4 at 3; CX5; CX13 at 26-29; *see* Tr. II at 196). To date, Respondent has failed to pay the entire produce debt of \$16,091.00 owed to Gaeten Bono. (*See* Discussion, *supra*, at 19-20).
  9. Respondent failed to make full payment promptly to the seller Dr. Produce for produce purchased on or between April 12, 2018 and April 15, 2018, in the total amount of \$1,600.00. (CX4 at 3; CX5; CX13 at 62-63; CX23 ¶ 12; CX29). As of at least April 24, 2019, Respondent failed to pay the entire produce debt of \$1,600.00 owed to Dr. Produce. (CX23 ¶ 12; CX29).
  10. Respondent failed to make full payment promptly to the seller US Fresh for produce purchased between September 17, 2018 and October 21, 2018, in the total amount of \$30,787.50. (CX4 at 3; CX5; CX13 at 96-115). As of at least April 24, 2019, Respondent failed to pay \$11,020.00 of the original \$30,787.50 produce debt owed to US Fresh (*see* CX13 at 105-11; CX23 ¶ 11), and the portion of the debt that has been paid was paid past due the twenty-one-day payment terms. (CX13 at 96-104, 112-14; CX23 ¶ 11; CX28). Also,

as of at least April 24, 2019, additional produce debt owed to US Fresh by Respondent (not listed in Appendix A to the Complaint in this case), in the amount of \$7,641.50, was thirty-one to forty-five days past due. (CX23 ¶ 11; CX28).

11. Respondent failed to make full payment promptly to the seller Banana Distributors of NY, Inc. for produce purchased between October 4, 2018 and October 9, 2018, in the total amount of \$13,032.00. (CX4 at 4; CX5; CX13 at 133-36). As of November 26, 2018, the entirety of the \$13,032.00 produce debt listed as owed to Banana Distributors of NY, Inc. in Appendix A to the Complaint in this case was paid in full; however, it was paid late: approximately thirty days past the fourteen-day payment terms set out by Banana Distributors of NY, Inc. (CX23 ¶ 10; CX27; *see* RX1 at 6).
12. Respondent failed to make full payment promptly to the seller Northeast Banana Corp. for produce purchased between October 9, 2018 and November 1, 2018, in the total amount of \$36,679.00. (CX4 at 4; CX5; CX13 at 116-31). As of December 19, 2018, the entirety of the \$36,679.00 produce debt listed as owed to Northeast Banana Corp. in Appendix A to the Complaint in this case was paid in full; however, it was paid late: approximately ten to twenty days past the thirty-day payment terms set out by Northeast Banana Corp. (CX23 ¶ 8; *see* CX13 at 116-31; RX1 at 40).
13. Respondent failed to make full payment promptly to the seller Circus Fruits Wholesale Corp. for produce purchased between October 19, 2018 and October 24, 2018, in the total amount of \$2,040.00. (CX4 at 4; CX5; CX13 at 137-41; *see* CX23 ¶ 5). As of November 14, 2018, the entirety of the \$2,040.00 in produce debt listed as owed to Circus Fruits Wholesale Corp. in Appendix A to the Complaint in this case was paid in full; however, it was paid

approximately five to ten days past the fourteen-day payment terms set out by Circus Fruits Wholesale Corp. (See CX23 ¶ 5; RX1 at 13).

14. Respondent made full payment promptly to the seller Fruitco Corporation for produce purchased on November 1, 2018. (CX13 at 132-45; CX23 ¶ 9; CX26; see Tr. II at 55). Respondent paid timely and in full for this produce on November 14, 2018, two days following the disciplinary investigation in this case. (CX26). Complainant was provided with evidence of this payment by Fruitco Corporation on November 24, 2016. (CX23 ¶ 9; CX26).
15. Respondent failed to make full payment promptly to the seller Agri-Mondo for produce purchased between December 7, 2017 and February 7, 2018, in the total amount of \$8,816.25. (CX4 at 3; CX22 ¶ 6(b); CX13 at 30-33). As of at least May 3, 2019, Respondent failed to pay the entire produce debt of \$8,816.25 owed to Agri-Mondo. (CX13 at 30-33; CX23 ¶ 17; CX34).
16. Respondent failed to make full payment promptly to the seller Produce Connection for produce purchased on February 4, 2018, in the total amount of \$5,670.00 (the original invoice was for \$37,674.00, but the amount was later adjusted). (CX4 at 3; CX13 at 34; CX23 ¶ 25; CX41). On May 31, 2016, a representative of Produce Connection provided a document entitled "Sales Report, Outstanding and Paid Invoices" that indicated the \$37,674.00 invoice listed as owed in this case was adjusted to the amount of \$5,670.00 and paid by Respondent by wire transfer on March 8, 2018. (CX41; see Discussion, *supra*, at 39-41). This payment was made thirty-four days after Respondent accepted the produce from Produce Connection and was not made timely; the original invoices states ten-day payment terms. (See CX13 at 34).

17. Respondent failed to make full payment promptly to seller Leonard's Express for produce purchased on February 20, 2018, in the total amount of \$22,338.00. (CX4 at 3; CX13 at 35; CX16; CX22 ¶ 6(c); Tr. I at 51-55). As of at least April 29, 2019, Respondent failed to pay the entire produce debt of \$22,338.00 owed to Leonard's Express. (See CX13 at 35; CX24).
18. Respondent failed to make full payment promptly to the seller Ryeco, LLC for produce purchased on February 28, 2018, in the total amount of \$1,284.00. (CX4 at 3; CX13 at 37; CX22 ¶ 6(d)). As of at least July 31, 2019, Respondent failed to pay the entire produce debt of \$1,284.00 owed to Ryeco LLC. (CX13 at 37; Complainant's Brief, Attachment 1 at 1).
19. Respondent failed to make full payment promptly to the seller B&M Avocados, LLC for produce purchased on March 2, 2018, in the total amount of \$39,715.00. (CX 4 at 3; CX13 at 36; CX22 ¶ 6(e)). On May 14, 2019, a representative of B&M Avocados provided a "customer quick report" showing a payment made by Respondent in the amount of \$15,000.00, made on July 3, 2018. (CX39). According to the representative, as of at least May 14, 2019, Respondent failed to pay \$23,115.00 of the original \$39,715.00 in produce debt owed to B&M Avocados. (CX23 ¶ 23).
20. Respondent failed to make full payment promptly to the seller Trufresh for produce purchased between March 17, 2019 and April 10, 2018, in the total amount of \$91,764.75. (CX4 at 3; CX22 ¶ 6(f); CX13 at 38-61; CX15; Tr. I at 37-42, 47-51). On June 4, 2019, a default reparation Order for this produce in the amount of \$54,824.76 was issued against Respondent, and this Order was not appealed. (See Complainant's Brief, Attachment 2; Tr. II at 184-85). As of at least July 12, 2019, Respondent failed to pay \$54,824.76 of the original \$91,764.75 in produce debt owed to Trufresh. (CX23 ¶ 27; see Complainant's Brief, Attachments 2 and 3).

21. Respondent failed to make full payment promptly to the seller Ag Grower Sales, LLC for produce purchased on June 18, 2018, in the total amount of \$88,704.00. (CX4 at 3; CX13 at 64). According to telephone interviews of Ag Grower Sales, LLC representatives conducted by Complainant (and information gathered during the interviews), as of at least April 30, 2019, Respondent failed to pay \$10,231.48 of the original produce debt of \$88,704.00 owed to Ag Grower Sales, LLC. (CX23 ¶ 16; CX33 at 8-11; *see* CX4 at 3; CX13 at 64; CX20; Complainant's Brief, Attachment 4). On June 5, 2019, a default reparation Order in the amount of \$79,755.28 was issued against Respondent. (*See* Complainant's Brief, Attachment 4). This award was for non-payment of a portion of the produce at issue in this case (an outstanding remaining amount of \$10,231.48 for invoice #1736, which originally totaled \$88,704.00) and for other produce purchased by Respondent from Ag Grower Sales on June 28, 2018, invoice #1774 (not originally at issue in this case), in the total amount of \$69,523.80. (*See* Complainant's Brief at 40-42; Complainant's Reply Brief at 18; CX23 ¶ 16; CX33 at 8-11). The Order containing the award for \$79,755.28 was not appealed. (*See* Complainant's Brief, Attachment 4). This default was reparation Order was not paid as of the date of hearing. (*See* Tr. II at 185). As of a least April 30, 2019, Respondent still owed \$10,231.48 to Ag Grower Sales, LLC. (CX23 ¶ 16; CX33; *see* CX4 at 3; CX13 at 64; CX20; Complainant's Brief, Attachment 4).
22. Respondent failed to make full payment promptly to the seller Paulmex International, Ltd. for produce purchased between June 8, 2018 and July 24, 2018, in the total amount of \$41,041.00. (CX4 at 3; CX13 at 65-73). On March 19, 2019, a default reparation Order for this produce in the amount of \$41,041.00 was issued against Respondent, and this Order was not appealed. (CX19). According to telephone interviews of Paulmex International Ltd.

representatives conducted by Complainant, as of at least May 9, 2019, Respondent failed to pay the entire produce debt of \$41,041.00 owed to Paulmex International Ltd. (CX23 ¶ 21; CX37). The default reparation Order was not paid as of the date of hearing. (*See* Tr. II at 185).

23. Respondent failed to make full payment promptly to the seller OTC Produce, LLC for produce purchased between July 6, 2018 and July 13, 2018, in the total amount of \$74,000.00. (CX4 at 3; CX36). As of at least May 9, 2019, Respondent failed to pay the entire produce debt of \$74,000.00 owed to OTC Produce, LLC. (CX23 ¶ 20; CX36).
24. Respondent failed to make full payment promptly to the seller Roland Marketing for produce purchased on July 30, 2018, in the total amount of \$7,523.50. (CX4 at 3; CX13 at 74; CX22 ¶ 6(g)). As of at least July 15, 2019, Respondent failed to pay the entire produce debt of \$7,523.50 owed to Roland Marketing. (*See* Complainant's Brief, Attachment 5; CX22 ¶ 6(g)).
25. Respondent failed to make full payment promptly to the seller Higueral Produce, Inc. for produce purchased between July 31, 2018 and September 1, 2018, in the total amount of \$109,898.07. (CX4 at 3; CX13 at 79-97). As of at least May 6, 2019, Respondent failed to pay the entire produce debt of \$109,898.07 owed to Higueral Produce, Inc. remained unpaid by Respondent. (CX23 ¶ 18).
26. Respondent failed to make full payment promptly to the seller Ergo Produce, Inc. for produce purchased on August 9, 2018, in the total amount of \$16,163.99. (CX4 at 3; CX13 at 75-78; CX23 ¶ 26; CX42;). On May 3, 2019 and June 11, 2019, a representative of Ergo Produce, Inc. stated that Respondent has made two payments towards this \$16,163.99 debt: on September 25, 2018, "CKF Produce II Corp." made a wire transfer to Ergo Produce, Inc. in

the amount of \$6,164.00; and on October 17, 2018, “CK Produce II Corp.” made a wire transfer to Ergo Produce, Inc. in the amount of \$5,000.00. (CX23 ¶ 26; CX42). Both of these payments were in partial payment of the debt listed as owed in Appendix A to the Complaint in this case, leaving a balance of \$4,999.99. (CX23 ¶ 26; CX42). On March 27, 2019, a default reparation Order for this produce in the amount of \$4,999.99 was issued against Respondent, and this Order was not appealed (it is therefore a final Order of the Secretary of Agriculture). (CX21 at 4-43). As of at least June 11, 2019, Respondent failed to pay \$4,999.99 to Ergo Produce, Inc. (CX13 at 75-78; CX23 ¶ 26; CX42).

### Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondent has failed to pay promptly twenty-one of the twenty-two sellers listed in Appendix A to the Complaint and Notice to Show Cause in this case. As of the dates occurring after hearing held on April 9, 2019 and April 10, 2019, Respondent has failed to pay seventeen of the sellers listed in Appendix A to the Complaint in this case, a total of \$596,354.30.
3. Respondent willfully, flagrantly, and repeatedly violated PACA section 2(4) (7 U.S.C. § 499b), and under PACA section 8(a) (7 U.S.C. § 499h(a)), the facts and circumstances of Respondent’s violations shall be published (in lieu of revocation of Respondent’s PACA license).<sup>371</sup> Pursuant to PACA section 4(d) (7 U.S.C. § 499d(d)), Respondent is unfit to be licensed under PACA, and Complainant’s refusal to issue a PACA license to Respondent is proper and shall be upheld.

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<sup>371</sup> See *Baiardi Chain Food Corp.*, 64 Agric. Dec. 1822, 1832 (U.S.D.A. 2005), *petition for review denied*, 482 F.3d 238 (3d Cir. 2002); *Scamcorp, Inc.*, 57 Agric. Dec. 527, 571 n.23 (U.S.D.A. 1998); *Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 633 (U.S.D.A. 1996).

## ORDER

1. A finding is made that Respondent CKF Produce, Inc. committed willful, flagrant, and repeated violations of PACA section 2(4) (7 U.S.C. § 499b).
2. The facts and circumstances of Respondent's PACA violations shall be published pursuant to PACA section 8(a) (7 U.S.C. § 499h(a)).
3. Respondent's application for PACA license is DENIED pursuant to PACA section 4 (7 U.S.C. § 499d). Pursuant to that section, Respondent shall be refused a PACA license for a period of at least two years. After the expiration of the two-year-period, Respondent may apply for a PACA license with a PACA license bond. Granting of a license under these circumstances shall be in the discretion of Complainant. After three years, Respondent may apply for a PACA license with no license bond.
4. Potentially interested or affected parties are alerted that any licensing and/or employment sanctions attendant to this Decision and Order pursuant to PACA sections 4(b) and 8(b) will take effect on the eleventh day after this Decision and Order becomes final. Persons "responsibly connected" to Respondent during the period of Respondent's violations are hereby alerted that they will be subject to the licensing restrictions under PACA section 4(b) and the employment restrictions under PACA section 8(b). Provisions allowing licensing after a finding of responsible connection are found in 7 U.S.C. § 499d. Provisions allowing employment after a finding of responsible connection are found in 7 U.S.C. § 499h.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondent unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.,  
this 30<sup>th</sup> day of March 2020

  
Channing D. Strother  
Chief Administrative Law Judge

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